The English torts of defamation and (false) privacy: analysing the impact of the overlap on defences, interim injunctions and damages

Ph. D Thesis

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Abstract

Following the enactment of the Human Rights Act 1998, the English law recognised direct protection of the right to privacy under the tort of misuse of private information (MOPI) by virtue of the House of Lords' judgment in the landmark case of *Campbell v MGN* 2004. The development of this emergent tort led it to acutely overlap with the subject matter of defamation law for two major reasons. Firstly, according to the Strasbourg jurisprudence, the interest of reputation, traditionally protected under defamation law, has been subsumed within the protective remit of the private life rights guaranteed by the Article 8 ECHR. Secondly, the false information, initially protected under the defamation law once it is defamatory, may also fall within the scope of the MOPI once it is private according to the authority of *McKennitt v Ash* 2006. Within this thesis, it is argued that any potential overlap would be practically unavoidable in the event of information being false, private and defamatory. The overall contribution to knowledge made by this thesis is to analytically address the implications of the overlap on the defences, interim injunction and damages, using a multi-perspectival approach. In doing this, it seeks out to fulfil three objectives. Firstly, it examines the applicability of the defences of defamation in privacy law and the potential harmonisation between defences to achieve a coherent protection to the freedom of expression. Secondly, it demonstrates the effectiveness of the likelihood test based on Article 12 (3) Human Rights Act 1998 (HRA) over the *Bonnard v Perryman* test concerning the application of interim injunction. Thirdly and finally, it analyses the impact of the damages awarded in order to address the reputational harms on the damages awarded in privacy.

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Table of abbreviations

Misuse of private information (MOPI)

Human Rights Act 1998 (HRA)

European Convention of Human Rights (ECHR)

Publication on matter of public interest (POMOPI)

European Court of Human Rights (ECtHR)

Harmful Digital Communications 2015 (HDCA 2015)

Conditional fee agreements (CFA)

Bonnard v Perryman (B v P)

Financial Reporting Council (FRC)

Civil Procedure Rules 1998 (CPR)

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Thornton v Telegraph Media Group Ltd [2011] EWHC 159 (QB)

Tillery Valley Foods Ltd v Channel Four Television Corpn and Another [2004] EWHC 1075 (Ch)

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Weller v Associated Newspapers Limited [2014] EWHC 1163 (QB)

Wennhak v Morgan [1888] 20 QBD 635

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Lindon and Others v France (2008) 46 EHRR 35, [2007] ECHR 836

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Mosley v. United Kingdom Application no. 48009/08 [ECHR, 2012]; at 109

P.G. and J.H. v. UK [2001] ECHR 550

Peck v UK [2003] ECHR 44

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Chapter 1: Introduction

This monograph aims to conceptualise the overlap between the torts of defamation and privacy by providing a deep analysis and justification of this overlap. It demonstrates how those false publications of sexual, medical or financial information, that could cause simultaneous harms to privacy and reputational rights, may provoke an overlap between the torts of defamation and privacy. It mainly examines case-law relating to the publication of voluntary, discreditable, private and lawful conduct respectively.[1] The thesis critically examines the arguments for positing the dichotomy of truth and falsity as a line clearly dividing the respective scopes of defamation and privacy in order to avoid their substantive overlap. In addition, the thesis analytically discusses the impact(s) of the overlap on defences, interim injunction and damages. Regarding the impact of overlap on defences, this thesis examines the potential application of defamation defences in privacy law in the event of both torts overlapping from distributive justice and local coherence perspectives.[2] Given that the defences in defamation and privacy law seek to guarantee an effective protection to freedom of expression, the question of inconsistency in such defences becomes acute. This thesis tackles this challenge and provides a significant analysis to the possible harmonisation of such defences. Subsequently, the thesis considers the appropriate rules around interim injunctions applicable within privacy law in the event of the information at being at once in violation of privacy and reputation.[3] The problematic of this issue is backed to the inconsistency between the interim injunction rules in defamation and privacy. This thesis critically and analytically explores the judicial approaches towards *Bonnard v Perryman*'s restrictive rule (as applied in

[1] *Mosley v MGN* [2008] EWHC 687 (QB); LNS *v Persons unknown* [2010] EWHC 119 (QB)
[2] *Mosley,* ibid.
[3] *LNS,* ibid.

defamation) within privacy law from coherence, efficiency and feminist analysis perspectives. Finally, this thesis considers the impact of the overlap upon respective damages within defamation and privacy, and how the similarity/difference between interest in privacy and reputation should affect the relative size of damages given in these areas. It examines to what extent the stand-alone award within privacy should be afforded primacy given the fact that the dissemination is simultaneously in breach of privacy and defamatory. This examination will be achieved via analysing the basis for including damages relating to reputational harms within privacy claims, the justification for awarding damages based on the concept of vindication of privacy, similar to those applied in defamation, and the potential accumulation of damages awarded in defamation and privacy actions as these are raised in respect of any single set of private and defamatory facts being published.

1. 1: Contextual Background and Rationale

The Human Rights Act 1998 (HRA) was a watershed moment in the protection of the right to respect for privacy in the UK. The HRA required public authorities to act in a manner compatible with the European Convention of Human Rights (ECHR): at the core of Article 8 ECHR is respect for privacy – the 'Right to respect for private and family life'. [4] The courts subsequently balance these Art 8 rights with the countervailing right of freedom of expression, guaranteed by Article 10 ECHR, using the test of proportionality based upon which the domestic courts struck the balance by identify the decisive factor, namely a real contribution of public interest, by which one of these conflicting rights outweighs the other.[5] Pace such a balancing methodology, the relationship between reputation and freedom of

[4] S. 6 HRA 1998; Kirsty Hughes & Beil Richards, 'The Atlantic divide on privacy and free speech' in Andrew Keynon, (eds) *Comparative Defamation and Privacy Law* (CUP 2016) 175.

[5] *Axel v Springer v Germany* [2012] 55 EHRR 6, [91]; *Von Hanover v Germany* [2012] 55 EHRR 15; *Campbell v MGN* [2004] UKHL 22; *Re S (FC) (a child)* [2004] UKHL 47; Hughes & Richards, ibid. 196.

expression is based upon the Article 10 (2) ECHR methodology, which states that freedom of expression may be restricted 'for the protection of reputation'. [6] This means that the interest of reputation represents a narrowly construed exceptional restriction upon the fundamental right of freedom of expression, due to its paramount importance. Such a methodology, that affords no equal importance to the competing interests of reputation and freedom of expression, locates in direct contrast to the methodology required by the article 8 ECHR that employs a proportionality test in competing matters of privacy and freedom of expression. English defamation law follows the methodology of rule v. exception applied in Article 10 ECHR rather than the methodology of proportionality applied in Art. 8 ECHR. [7] This methodological divergence between privacy and defamation might be less controversial and problematic since ECHR signatory States enjoy a wide margin of appreciation or discretion around deciding the measures by which to achieve compliance with the convention rights. [8] Based on the methodology of the Article 10 (2) ECHR, English defamation law has been dramatically reshaped in order to afford freedom of expression wide protection through several defences: these include truth, honest opinion, publication relating to matters of public interest, and absolute and qualified privileges. [9] The relationship between defamation and privacy is not only predicated upon the fact that both torts represent a central issue in media law – the conflict between freedom of expression and privacy rights protected in such torts –

[6] Tanya Aplin & Jason Bosalnd, 'the uncertain landscape of Article 8 of the ECHR: the protection of reputation as a fundamental human right?' in Andrew Keynon, (eds) *Comparative Defamation and Privacy Law* (CUP 2016), 265.

[7] Such a methodological divergence between the torts has been used to challenge the tortious nature of misuse of private information (MOPI): a cause of action under English law that protects the privacy rights articulated in Art 8 ECHR. See: Jojo Y. C. Mo, 'Misuse of private information as a tort: The implications of Google v Judith Vidal-Hall' (2017) 33 computer law & security review 87, 91; Barbara McDonald, 'Privacy Claims: Transformation, Fault, and the Public Interest Defence' in Dyson and Goudkamp (eds.), *Defences in Tort* (Hart Publishing 2015) 290, 297.

[8] Patrick O' Callaghan, 'False privacy and information games' (2013) 4 J. E. T. L. 282, 303.

[9] Andrew Kenyon, 'Defamation and privacy in an era of more speech' in Andrew Kenyon, (eds) *Comparative defamation and privacy law* (CUP 2016) 4.

but also because privacy, as a value, was subject to indirect protection under defamation law prior to receiving direct protection under MOPI. The fact that some cases of defamation law could alternatively be cases of privacy and vice versa may make the overlap between defamation and privacy of paramount importance because such torts provide different levels of protection to the defendant's freedom of expression. [10] This conceptual overlap of defamation and privacy becomes acute when the Strasbourg's jurisprudence has shifted the position of reputation from being an exceptional restriction of the freedom of expression in Article 10 (2) ECHR, to become an aspect of private life under Article 8 ECHR. [11] The different methodologies applied in the English defamation and privacy torts may make the overlap critical because the reputational interest protected under the English law of defamation is not subject to a proportionality test applied to MOPI, which treats privacy as equal to the competing interests under freedom of expression. However, when the courts decided that the protected remit of MOPI may include falsehoods, traditionally dealt with under defamation, this overlap accomplishes a potentially problematic shift from a conceptual to a materialistic level. [12] This overlap represents a vital challenge to the well-established balance between the reputation and freedom of expression, potentially manifest in those cases where the claimant brings privacy action instead of defamation. [13] Many scholars, like David Rolph and David Partlett, argue that enabling claimants to circumvent the established principles of defamation law through bringing a MOPI claim, which applies a balancing methodology, could undermine the balance between freedom of expression and reputational interests developed

[10] Tamar Gidron, 'Publication of private information: an examination of the right to privacy from a comparative perspective (2010) J. S. Afr. L. 271, 286.

[11] Alpin & Bosland, (n 6) 266; this approach will be discussed in Chapter 3

[12] *McKennitt v Ash* [2006] EWCA Civ 1714.

[13] David Rolph, 'the interaction between defamation and privacy' in Kit Barker, Karen Fairweather & Ross Grantham, (eds) *Private Law in the 21st century* (Hart Publishing 2017) 469-70.

over decades within the law of defamation. [14] This expansion of privacy scope may even challenge the existence of defamation law, since privacy law may encapsulate what was traditionally considered an issue for defamation.[15] That freedom of expression guaranteed by article 10 ECHR ought not to be easily restricted, given that such technically unrestricted freedom of expression potentially promotes democratic values, the discovery of truth, enhancement of citizenship, individual development, facilitation of democratic deliberation and governmental accountability. [16] Furthermore, the overlap could affect the future of the media industry should it shift the protection of freedom of expression from the scope of defamation law to the scope of privacy law. [17] The media industry operates in a competitive and global commercial environment, adding further significance to the overlap. Media survival depends on the sales of publications and an imbalance between privacy and free speech may influence media companies' economic revenues and, ultimately, their continued existence. [18] Media companies' legal liabilities would differ depending on the cause of action upon which claimants rely. Moreover, the overlap may influence the economic viability of media outlets should the claimant simultaneously bring defamation and privacy actions and be awarded damages for both. Similarly, the overlap may also affect individuals' rights since the legal protection for public figures (such as politicians) would be classified at a lower level under defamation: this is due to the difficulty of obtaining n an interim injunction to protect the reputation if the defendant decides to justify the defamatory publication under *Bonnard*

[14] Ibid.; David Partlett, 'New York Times v. Sullivan at fifty years: defamation in separate orbits' in Andrew Kenyon, (eds) *Comparative Defamation and Privacy Law* (CUP 2016), 60.
[15] Ursula Cheer, 'Divining the dignity torts: a possible future for defamation and privacy' in Andrew Kenyon, (eds) Comparative Defamation and Privacy Law, (CUP 2016), 311;
[16] Gavin Philipson, 'Press freedom, the public interest and privacy' in Andrew Keynon, (eds) *Comparative Defamation and Privacy Law* (CUP 2016), 138; Partlett, ibid. 60.
[17] See chapter 5.
[18] Philipson, ibid. 142-4.

v Perryman. [19] The overlap may also raise a problematic issue to public figures when they bring MOPI to truly protect their privacy rights, given that in such circumstances there could also be a willingness to protect even indirectly their right to reputation. [20]

The developments explained above, whether in respect of the interaction between reputation and private life based on Article 8 ECHR *or* of the recognition of false privacy within the ambit of privacy, [21] have ramifications for defamation actions and MOPI. The inclusion of reputation within the protective remit of Article 8 ECHR might require the courts to follow the same methodology of proportionality to defamation claims as applied in privacy claims.[22] This means that the court might seek to balance the claimant's reputation with the defendant's freedom of expression in an equation founded upon the equality of both rights.[23] The other ramification with regards to reputational aspects of Art 8 is that the defences applied in defamation may require a reassessment, given that they are built upon the presumptive precedence of freedom of expression in Article 10 ECHR. [24] Furthermore, the inclusion of reputational interest within the context of Article 8 ECHR might affect the justification for single rule meanings, as applied in defamation, since such rules might potentially ignore truly harmful infringements of an individual's right to private life. In addition, the single publication rule applied in the Defamation Act 2013 s. 8 might frustrate justice and create an imbalance between article 8 and 10 ECHR, because each reading of the defamatory publication is seen to potentially harm individuals' private lives. [25]

[19] See Chapter 6.
[20] Ursula Cheer, (n 15) 313.
[21] See chapter 4.
[22] Alastair Mullis & Andrew Scott, 'The swing of the pendulum: reputation, expression and the re-entering of English libel law' (2012) 63 Northern Ireland Legal Quarterly, 27, 44.
[23] This methodology has been ruled in Re S (A Child) [2004] UKHL [17] per Lord Steyn.
[24] Mullis and Scott, Ibid. 48.
[25] Ibid. 56-7.

Regarding the protection of false private information (false privacy) within the remit of privacy, such falsity-based expansions create overlaps between defamation and privacy actions. [26] The term 'overlap', which constitutes the crux of this study, refers to situations where two causes of action could be brought in respect of the same set of facts.[27] In *Terry (previously LNS) v Persons unknown*, [28] Tugendhat J identified the situations within which an overlap between defamation and privacy actions could be raised; both actions could be brought in respect of publications relating to voluntary, discreditable, personal and lawful conduct, whether sexual, financial or other. In *ERY v Associated Newspapers Limited,* Nicol J agreed with Tugendhat J about the existence of such overlaps, stating that 'a threatened publication may jeopardise both the claimant's reputation and his privacy'. [29] However, such overlaps between defamation and privacy potentially create severe legal problems, since they may facilitate circumventing the respective, differing requirements of legal protection convened by each tort.[30]

The first implication of the overlap relates to what extent defences that are available in defamation could be applied within privacy actions.[31] The judiciary left this question unanswered in *Mosley v MGN*. Herein, Eady J was receptive to a *Reynolds*/responsible journalism defence (which is now replaced by the statutory defence of publication on matter of public interest POMOPI) being applied in a case involving privacy.[32] The same approach was

[26] Alistair Mullis and R. Parkes, Gatley on Libel and Slander (12th edn, Thomson Reuters 2013) 837; Richard Parkers, 'privacy, defamation and false facts' in Nicole A. Moreham & Sir Mark Warby, (eds) *Tugendhat and Christie: The Law of Privacy and the Media* (3rd edn, Oxford University Press 2016)351.
[27] Tamar Gidron, 'publication of private information: an examination of the right to privacy from a comparative perspective (part 2)' (2010) TSAR 271, 283.
[28] *LNS v Persons unknown* [2010] EWHC 119 (QB) [96].
[29] [2016] EWHC 2760 (QB) [67].
[30] Rolph, (n 13) 476-7; Gidron, (n 26) 281.
[31] Rolph, ibid.; Elspeth Reid, 'No Sex Please, We're European: Mosely v News Group Newspapers Ltd' (2009) 13 Edinburgh L. Rev. 116. 120
[32] [2008] EWHC 687 (QB) at 141.

also mentioned in *LNS v Persons Unknown* when Tugendhat J referred to the possibility of applying the defence of POMOPI, should the claimant choose to bring a MOPI action when both actions overlap. [33]

The second implication of this overlap concerns the extent to which the inflexible rule of interim injunctions in defamation can be applied to privacy cases. [34] The interim injunction, generally speaking, is an interlocutory remedy made during early stages of the litigation; it seeks either to prevent the initial publication or to prohibit further publication. [35] There are inconsistent rules about the application of interim injunctions within defamation and privacy torts respectively. In defamation, the use of an injunctive order, or the *Bonnard v Perryman* rule, is highly circumscribed since no injunction can be granted if the defendant decides to defend her publication at trial. [36] Conversely, application of interim injunction rules within privacy are highly flexible; an interim injunction could be granted if the applicant's claim is more likely than not to be successful at trial.[37] This problem was identified by Tugendhat J in *Terry v Persons Unknown*. There he ruled that the nub of the injunctive application, made under privacy or MOPI, was, in reality, an effort to protect the applicant's commercial reputation. As this fell within the interest protected by defamation, and 'not any other aspect of LNS's private life', his Justice concluded that 'in accordance with Bonnard v Perryman no injunction should be granted'. [38] However, Tugendhat J further justified his refusal of the injunctive relief with reference to the rule of Article 12 (3) HRA 1998 as applied in MOPI

[33] *LNS,* ibid. [96].
[34] O'Callaghan, (n 8) 287.
[35] Normann Witzleb, 'Interim injunction for invasions of privacy: challenging the rule in Bonnard v. Perryman?' in Normann Witzleb & al (eds), *Emerging challenges in privacy law* (CUP 2014) 414.
[36] *Bonnard v Perryman* [1891] 2 Ch 269; Greene v Associated Newspapers Ltd [2005] EMLR 217, [2004] EWCA Civ 1462, [2005] 3 WLR 281, [2005] 1 All ER 30, [2005] QB 972 [78].
[37] *Cream Holding Ltd v. Banerjee* [2004] UKHL
[38] *LNS,* (n 27) [95 & 123].

concerning a potential public interest-centred defence, since it is important to prevent the public from being misled.[39] Conversely, the problematic nature of interim injunctions becomes significantly pronounced if and when reputation and privacy can be engaged in one case. An example was clearly identified by Nicol J in *ERY v Associated Newspapers Ltd:* [40]:

> 'In the present case, I cannot agree that the nub of the Claimant's claim is the protection of reputation. There is a reputational element to it, but, since that is the case with many privacy cases, that does not take the Claimant far enough. Mr Caldecott has not persuaded me that the nub or essence of the claim is the protection of the Claimant's reputation to the exclusion of that cluster of interests which privacy is intended to protect'.

The third and final implication arising from the overlap, considered in this thesis, relates to the damages awarded in both causes of action. There are three enquiries potentially raiseable with regards to the impact of overlap on damages: the inclusion of reputational harms within the elements of damages awarded in privacy, the vindication of privacy rights, and the accumulation of damages awarded in defamation and privacy actions brought in respect of the same harmful publication.

1. 2: The Research Questions

The research questions of this thesis fundamentally relate to the implications of this overlap between defamation and MOPI around defences, interim injunction and damages. As previously explained, the problematic overlap starts with the judicial decision to protect false private information within the remit of privacy. The first research question that this thesis

[39] Ibid. [125, 128].
[40] Ibid. [68].

therefore sets out to test is '*To what extent should privacy law protect false private information?'*. There would be no materialistic overlap between defamation and privacy, as many scholars argue, if false publications were to fall exclusively within the protective scope of defamation, and merely true private information should be actionable under MOPI. This thesis, however, argues that privacy law should protect false private information, and the overlap with defamation is substantively and factually unavoidable in the event of information being false, private and defamatory. Thus, it would be logical and imperative to critically discuss the academic literature relating to the desirability of avoiding such overlaps through excluding falsity from the protective remit of MOPI.

The main question this thesis poses relating to impact of overlap on defences is *'To what extent should privacy law apply defences of defamation if both torts overlap?'*. It therefore seeks to examine the relationship between defamation and privacy defences, one which should logically attain a level of harmonisation since such defences primarily seek to promote free exercise of expression. The thesis therefore examines the possibility of harmonising certain defences through unifying the requirements (elements) necessary to provide freedom of expression right with coherent protection. Regarding the impact of the overlap on the interim injunction, the question raised in this respect pertains to the correct applicable rule of injunctive relief within cases involving defamatory and private information. This thesis examines the question of whether '*the defamation rule of interim injunction should be applied in privacy cases if disclosure of private information has also caused reputational harms?*'. Concerning the impact of the overlap on damages awarded in defamation and privacy, the thesis explores whether damages awarded in defamation and privacy raised from the same publication amount to double compensation. Such a dilemma is accentuated where reputation and private life are deemed two aspects of Article 8 ECHR rights. There are three

correlated questions which this thesis examines: firstly, *'Should privacy damages take into account the vindication of privacy right following the same procedures as in defamation law*?'; Secondly, *'Should reputational harms be included under privacy law, or, should reputational harms only be protected by defamation?'*; Finally, *'Are defamation and privacy damages cumulative should a claimant be successful in pursuing both actions?'*.

1. 3: The methodology and scope of research

In order to examine the implications of the overlap between defamation and privacy, this research study follows a mixture of methodological approaches, combining: a doctrinal approach (also known as black letter legal research) and an interdisciplinary approach/socio-legal analysis. Understanding the overlap logically demands an understanding of what the law of defamation is, and what the law of privacy is. This necessarily requires adopting a doctrinal methodology that concerns analysing the legal rules found within the statutes and cases in order to formulate legal doctrines. [41] The doctrinal methodology is used to clarify the legal rules of defamation and privacy, whilst exploring defences, interim injunction rules and damages. This clarifies both the inconsistency of legal rules and the problem of such inconsistency if and when both laws overlap. The methodology used here simply enables that imperative description and understanding of the law from an internal perspective; consequently, another methodology must be used to evaluate the effectiveness of the law to achieve a particular social goal. [42] Identifying the inconsistency/difference between the rules within defamation and privacy, as this thesis undertakes, would logically require choosing the right applicable rule in the case of overlap. In doing so, there would undoubtedly arise a need

[41] Paul Chynoweth 'Legal research' in Andrew Knight & Les Ruddock (eds), *Advanced research methods in the built environment* (Blackwell Publishing Ltd 2008) 29.
[42] Ibid. 30.

to refer to external factors or goals when evaluating the effectiveness of either defamation or privacy rules in overlapping cases. Hence, this thesis also adopts an interdisciplinary or 'law in context' methodology that considers multidisciplinary perspectives to inform and influence the outcomes of legal questions addressed in this study. [43] The interdisciplinary approach deploys pluralistic perspectives or disciplines external to legal theory to face the questions which arise pertaining to societal, economic and ethical obligations based upon relative distributions of power and conceptions of the public interest in order to identify solutions appropriate to achieving desirable outcomes.[44] Such methodology is adopted in order to analyse the impact of applying either defamation or privacy rules in the overlap from the chosen perspectives.

This thesis examines and analyses these research questions from multidisciplinary perspectives, engaging coherence theory, efficiency theory, and feminist analysis. It also examines the overlap through legal theories, chiefly distributive justice, access to justice and procedural law. The justification for engaging such a variety of perspectives pertains to the core research questions arising from the overlap and to existing arguments proposed within the critical literature in respect of such overlaps. Firstly, the justification for analysing overlaps from a coherence perspective is predicated upon the argument that such overlaps potentially undermine the coherence of the whole legal system. This chapter's argument suggests that a more desirable outcome emerges from the overlap between defamation and privacy if the analysis was based upon local than global coherence.

[43] Ibid. 31.

[44] William Twining, *Law in Context: Enlarging a Discipline* (Clarendon Press, 1997) 20.

Secondly, efficiency is a general goal of tort law, and it is used to analyse the questions arising from the overlap between defamation and privacy. [45] Such economic analysis may also prove crucial in addressing the main question of this study; that is, whether privacy law should protect false private information or, as many scholars argue, should only fall under the purview of defamation law. The economic analysis could provide a solid and convincing basis upon which to decide which law may provide the most efficient solution to this question. Efficiency could also apply when deciding upon the most desirable rules for the application of interim injunctions in those cases where defamation and privacy overlap. This is particularly pertinent in light of the critical observation that a significant body of literature regarding efficiency concerns itself with defamation and privacy.

Furthermore, the relevance of feminist analysis to the questions arising from the overlap is founded upon the critical extrapolation that sexual disclosure may equally raise issues of defamation and privacy. It is thus vital to examine the research questions of this study from that feminist analysis perspective which more readily permits identification of solutions most likely to consider the particularity of harms befalling women: it names and identifies, then proposes concomitant solutions to, gender-biased unequal dynamics within standards applied within adjudication of sexual disclosure. Since sexuality is one of feminist theory's central concerns, analysing the overlapping questions using a feminist analysis perspective feasibly adds significant value to our discussion. Furthermore, both defamation and privacy deal with issues of gender as relating to the publication of matters relating to sex and sexuality. A feminist analysis approach is employed for the purposes of supporting false

[45] Further information about the desirability of efficiency in tort law see, Tsachi Keren-Paz, *Torts, egalitarianism and distributive justice* (Ashgate 2007) 42-4.

privacy claims and determining the right application of injunctive rules in the overlap between defamation and privacy.

Alongside these interdisciplinary approaches, a variety of legal theories are explored in this thesis. The fact that both defamation and privacy are tortious causes of action requires discussion of those questions of overlap underpinning tort law theories such as distributive justice. This study is concerned with adopting a progressive approach to tort law in order to redistribute the benefits and burdens between the advantaged and disadvantaged members in society. Such distribution may involve enhancing the benefits of reallocating burdens from the latter to the former. Tort law is a valuable mechanism for distributing or allocating burdens (harms) caused by involuntary interactions in private settings; however, such distribution or allocation of losses depends on specific criteria and considerations. These include fault where this is based on the tortfeasor's obligation to allocate the burdens (losses) caused to others based on a notion of deterrence or negative desert[46]. This study also takes into account two considerations based on which the burdens of tortious activities could be distributed: fairness and loss-spreading. These criteria are used to examine whether the judicial approach to applying defences of defamation in privacy cases could lead to a fair distribution of burdens. Overlap also raises issues related to civil procedures such as access to justice. Defamation and privacy actions are significantly expensive; consequently, it is relatively difficult for people of limited incomes to access means of judicially protecting their rights or to prevent such breaches. Libel cases have traditionally been classified as a 'rich man's tort' due to the unaffordable costs of litigation. Access to justice, in turn, is necessarily considered within this work's analysis.

[46] Ibid. 16.

This thesis then applies distributive justice to examination of that research question relating to potential applicability of defamation defences in privacy. The relevance of distributive justice to the questions raised from the overlap mainly relates to the potential application of defamation defence of POMOPI within privacy cases where such cases involved an overlap. Defences ostensibly centred around protecting defendants' rights to freedom of expression within privacy cases, in fact constitute judicial attempts to de facto reallocate goods among members of society. These redistributive attempts were sought on the grounds that freedom of expression constitutes the same countervailing interest in both torts. Since publication on matter of public interest (POMOPI) depends on the reasonable belief of the defendant that the information in question serves the public interest, this study examines to what extent such belief could be reasonable if applied in privacy cases from a distributive justice perspective in light of the aforementioned fairness and loss-spreading factors.

The scope of this thesis, as its title indicates, encompasses the impact of this overlap between defamation and privacy only as it relates to defences, interim injunction and damages. The impact on other issues, such as serious harm requirement, limitation periods and the potential chilling effect on freedom of expression resulting from the accumulation of legal liabilities of defamation and privacy from a single publication, fall outside of the scope of this thesis because of the limitations of time and scale. This thesis is ultimately concerned with English law because the central issue of the overlap remains problematic and under-development in this jurisdiction. However, it comparatively deploys readings of American false light tort as a means by which to evaluate the case for, and then support the thesis' contention that false privacy ought to be recognized within interpretation of English law. The divergence between English and American law in respect of the balance between the interests

of privacy and reputation against freedom of expression is potentially predicated upon the difference between the constitutional frameworks determining the legal protection of such rights. While English jurisdiction is heavily governed by the Strasbourg's proportionality methodology that equally treats the rights in conflict, the First Amendment under US law affords freedom of expression relative superiority or precedence in cases of conflicting rights.[47] English defamation law, when compared with American law, is decidedly categorizable as a pro-claimant because since the former initially presumes falsity and malice in the claimant's favour, and the onus of proving the contrary resting upon the defendant; conversely, the American law initially presumes the truth of the statement complained of and the absence of malice on the part of the defendant, with the burden of proof regarding falsity and malice falling upon the claimant's shoulders.[48] Nonetheless, the employment of American law in respect of the overlap between defamation and false light undoubtedly assumes paramount importance within our study, since such law recognised the tort of privacy and the overlap between defamation and privacy several decades before such overlaps were correspondingly recognised within English law. The seminal article of 'The right to privacy', written by Louis Brandeis and Samuel Warren in December 1890, may represent the starting date of the legal history of American privacy protection which was considered by the press as a real challenge to its free speech right guaranteed by the First Amendment. [49] However, the actual four categories of privacy torts recognised in the Restatement of Law traced initially back to the seminal article 'Privacy' written by William Prosser, known as the

[47] Hughes & Richards, (n 4) 197.
[48] Russell Weaver, 'Defamation and democracy' in Andrew Keynon, (eds) *Comparative Defamation and Privacy Law* (CUP 2016), 84.
[49] Ibid. 166-7.

Dean of American tort law. [50] Prosser identified the issue of overlap between defamation and privacy in his seminal article in 1960. [51] He mentioned that false light tort raised in respect of the publicity of false information might swallow up defamation law since false light scope could be widened to include even what may initially fall within the protective scope of defamation. [52] Prosser also explained the potential overlap between false light and defamation based upon the shared foundation of seeking to protect the individual's reputation when the latter has been tarnished by the publicity of false allegations.[53] Prosser consequently asked whether such overlap would allow circumvention of restrictions such as limitation periods and constitutionally procedural and substantive protections of freedom of expression developed over decades within the context of defamation. [54] Privacy torts, similar to defamation, may impose restrictions on free speech rights which must remain 'uninhibited, robust, and wide open'; thus, an overlap raises concerns about the First Amendment protection of public debate (providing listeners and readers crucial insights) in a democratic society. [55] Based on the First Amendment the American Supreme Court marked out equal affordance given to protection of free speech rights whether under defamation or privacy actions brought by government officials, heads of states and celebrities respectively. [56] The Restatement of Torts (second) also followed a similar approach by equally applying some of

[50] The American Law Institute, Restatement of the Law (second) Volume 3 (1977) § 652; William Prosser, 'Privacy' (1960) 48 California Law Review, 383.
[51] Neil M. Richards & Daniel J. Solove, 'Prosser's Privacy Law: A Mixed Legacy' (2010) 98 California Law Review 1887, 1891.
[52] Prosser, ibid. 401.
[53] Ibid. 400;
[54] Ibid. 401; Richards & Solove, ibid. 1900.
[55] Hughes & Richards, (n 4) 171.
[56] Ibid. 183-90.

the restrictions (defences) in defamation and privacy torts in order to afford freedom of expression equal protection under each action. [57]

This thesis is carried out via desk-based research which focuses on consulting basic primary and secondary resources. [58] The primary resources vary from statutes to the relevant cases law pertaining to defamation and privacy law. Concerning the acts, defamation acts from 1952, 1996 and 2013 have been deployed throughout the whole thesis, as too leading cases in common law regarding the longstanding rules of defamation. Given the recent judicial recognition of English privacy or MOPI this thesis has consulted the landmark cases as well as those most recent cases involving new judicial approaches as these are relevant to the research questions of this study. Beside primary resources, secondary resources such as textbooks and academic articles have been widely consulted. In support of the 'law in context' methodology, this thesis explores a spectrum of informed sources accessed through the library and internet websites, which have been in turn used critically to discuss the arguments made throughout the study.

1. 4: The structure of the thesis

There are seven chapters, excluding the introduction, which follow a logic of sequential development: these reflect upon the overlap and its implications for defences, interim injunction and damages. The objective of this research is to address the core questions raised from the overlap between defamation and privacy so as to provide convincing and justified answers based on the selected framework. Given this objective, the thesis begins with a necessary explicatory overview of the torts of defamation and privacy.

[57] The Restatement of Torts equally allows applying absolute and conditional privileges in defamation and privacy. See chapter 5.
[58] Nick Moore, *How to do Research* (Third Revised Edition), 2006.

Accordingly, Chapter Two explores the basic structure of both defamation and privacy torts, explaining how the interests of reputation and privacy receive corresponding legal protection in the English jurisdiction, in order to provide a background to the debate underpinning core arguments of this thesis. The first section of this chapter explains the structure of defamation. It begins by elucidating the development of defamation law and its core interest of reputation. This section is divided into two subsections dealing with the legal requirements/elements around bringing libellous action, and the legal presumptions that the claimant is not required to prove but could be rebutted by the defendant. The second section of Chapter Two explores the development of legal protection of privacy. It begins with an overview of the meaning of privacy and gradual development of its protection from equitable action of breach of confidence to the current protection under the action of misuse of private information (MOPI). The next subsection of Chapter Two's second section illustrates the structure of MOPI action from the reasonable expectation test to the proportionality test.

Chapter Three maps the conceptual and materialistic overlaps between defamation and privacy. In this respect, the conceptual accounts and the judicial authorities (equally from English and Strasbourg jurisprudence) are presented in a manner such as to draw out these overlaps. The first section aims to conceptualise the overlap through analysis of three consecutive dimensions: the theoretical foundations that underpin the values of privacy and reputation, English authorities, and the Strasbourg jurisprudence. The second section, thereafter, maps the theoretical framework upon which the research questions of this thesis are analysed. Its main purpose is to provide a background for the conceptual building of the selected framework. Here, the argument shows that false private information or false privacy may constitute, materially speaking, the core of the overlap, ergo providing a bridge for more in-depth consideration of this issue within the subsequent chapter.

Chapter Four illustrates the subject matter of the overlap that relates to the judicial approach to protecting falsehoods within the protective remit of privacy if the claimant proves her expectations around keep such information private were reasonable. As explained previously in the Introductory literature review, many scholars argue that privacy law should preclude false information from falling within its protective scope to avoid undesirable overlap with defamation. The first section critically deals with the arguments excluding false information from remit of privacy. The thesis unravels the conceptual and doctrinal unsoundness of such arguments since the touchstone of defamation law is whether the information is defamatory in the first place. The issue of falsity and truth of such information is a matter of legal presumption that could be refuted by a defence of justification. Using various perspectives, the thesis explores how privacy law should protect false private information and explores how the current English judicial approach justifies the irrelevance of the truth and falsity argument. Besides the various perspectives used to argue the rightness of including false private information within a privacy remit, American false light tort is also used to provide further evidence for the thesis' fundamental claim. Despite the different requirements and tests applied in false light and false privacy, it will analytically corroborate the thesis' assertion that both share similar theoretical foundations as well as explicating how false information could undermine our privacy rights.

Whilst Chapter Four asserts the fundamental claim that false private information ought to be protected by privacy and that overlap between defamation and privacy would be unavoidable in the event of information forming the basis of a matter being private, defamatory and false, the following chapters respectively deal with the impact of the overlap on defences, interim injunction and damages. Chapter Five builds on the question of the potential applicability of defences of defamation in privacy. As it will discuss, the English

judiciary, from *Mosley v MGN* [59] to *ZXC v Bloomberg L.P.,* [60] provides no definitive answer to such a question – rather its judgements reflect an obvious uncertainty around the applicability of defences developed in the landscape of Article 10 ECHR to the landscape of Article 8 ECHR, with each respective matter seeing the application of a different methodology. This chapter, therefore, is divided into three sections: the first section provides an overview of the defences of defamation and privacy, the second section explains the interaction between such defences to assess the justifications of their differences, if any (such as publication on matter of public interest vs public interest); the third and final section evaluates the soundness of importing defamation defences into privacy territory, using coherence and distributive justice perspectives. It emphasises the argument that any harmonisation of defamation defences with privacy through requiring consideration of public interest elements within truth and honest opinion defences may increase the coherence between defamation and MOPI. It does so on the grounds that their protected interests fall within the landscape of Article 8 ECHR on the one hand, whilst both torts also seek to guarantee coherent protection to the freedom of expression under Article 10 ECHR. Nevertheless, considerations of local coherence, fairness and loss spreading, as this thesis emphasises and this Chapter discusses, may provide convincing grounds for precluding the application of qualified privileges and publication of matters of public interest from privacy law.

The objective of Chapter Six is to consider the impact of the overlap on the applicable rule of the interim injunction. Accordingly, the chapter explores at the outset the rules of injunctive relief in defamation and privacy; it also critically examines the justifications for

[59] (n 33)
[60] [2019] EWHC 970 (QB)

applying two rules to obtain injunctive orders prohibiting private or defamatory information. In this chapter, the thesis analyses in greater depth how the two tests of interim injunction consistently interact and where there could be dynamic, potentially tense interaction between such tests. A particular focus of this analysis will concern the application of local coherence, efficiency and feminist analysis perspectives from the perspective of affording priority to privacy over the defamation tests associated with interim injunctions. Accordingly, the thesis analyses the impact of applying the privacy test to achieve the common goal underpinning the above perspectives and demonstrates, conversely, how the application of defamation test could cause undesirable outcomes. The final question which this thesis addresses, relates to the impact of the overlap around damages awarded in defamation and privacy. Chapter Seven tackles three correlated issues concerning such damages: the extent to which the reputational harm is included within the assessment of privacy damages; the role of vindication in assessing damages awarded in privacy cases if harms to reputation are accompanied by privacy harms; and the potential accumulation of privacy and defamation damages if both actions were successfully pleaded. These issues are respectively addressed after an overview of size, purpose, and types of damages in defamation and privacy law. The evaluation of these issues is analysed based on the established rules in the common law as well as the selected theoretical framework. In Chapter Eight, the thesis concludes by critically describing these outcomes and aggregating them against the overall research questions outlined above within this Introductory chapter. Beside these outcomes, the overall conclusion also identifies the contribution to knowledge and highlights the scope of the overlap as this may potentially constitute the basis of further enquiry.

Chapter 2: The overview of defamation and privacy torts

2. 1: Introduction

An overall comprehension of scope, elements, and tests of the torts of defamation and privacy is a vital prerequisite to effectively map the overlap between such torts. However, the analysis within this Chapter is limited to the main structures of defamation and privacy since the detail of defences, interim injunction rules, and damages are explained in the subsequent chapters. Therefore, the chapter is divided into two main sections: the first section elucidates the well-established rules of defamation, tests and presumptions, which are a subject of development over centuries in English jurisdiction. [61] The second section deals with the emergent action relating to misuse of private information which protects the right to privacy in English law.

2. 2: The overview of Defamation tort

This section briefly elaborates on the main structure of defamation law under three interrelated subsections to provide a clear overview of the tort of defamation. The first subsection shortly explains the development, definition and purpose of defamation law. The second subsection points out the main elements of defamatory meaning, reference and publication, that the claimant must prove to proceed libellous action. The final subsection elaborates the legal presumptions of falsity, malice and (previously) reputational damage, that English defamation law presupposes for the sake of the claimant once she establishes the defamatoriness of allegations in suit.

[61] *Lachaux v Independent Print Ltd and another* [2019] UKSC 27.

A- Definition and purpose

The purpose of defamation law was developed over time. Initially, its focus lay in the desire of the Crown and Church to maintain the public order from the threats of religious and political discussions promoted by the printing press. Later, it gravitated increasingly towards the protection of 'great men's' honour; finally, by the early 19th Century, it sought to protect the interests of a reputation as such. [62] Bringing reputational interest within the ambit of defamation law provoked a controversial debate around the real meaning of reputation, and how a statement could cause harms to such interest. [63] The Faulks Committee defined defamation as '[consisting] of the publication to a third party of matter[s] which in all circumstances would be likely to affect a person adversely in the estimation of reasonable people generally'. [64]

This definition implies a general formulation of this tort's key components and its purpose. Conversely, Tugendhat J classified the defamation tort into two categories: personal defamation; and business or professional defamation. [65] Personal defamation is based upon publication harming an individual's character or attributes established in relation to her alleged conscious acts or voluntary choices which include imputations of illegal, unethical, immoral, or socially harmful behaviour. [66] Personal defamation can be also committed by the imputation of non-voluntary conduct or misfortune such as insanity or diseases that consequently leads the claimant to be shunned, avoided, or ridiculed. [67] Business

[62] *Lachaux*, (n 61); Lawrence McNamara, *Reputation and defamation* (OUP 2007) 77.
[63] *Thornton v Telegraph Ltd* [2010] EWHC 1414 (QB) [28]; Eric Barendt, 'What is the Point of Libel Law?' (1999) 52 Current Legal Problems 110.
[64] Faulks Committee Report on Defamation (1975) Cmnd. 5909; S. Deakin, A. Johnston & B. Markesinis, *Tort Law* (7th edn, OUP 2013) 63
[65] *Thornton*, ibid. [33].
[66] Ibid. [33] i &ii.
[67] Ibid. [33] ii.

(professional) defamation occurs if an imputation adversely affects the claimant's commercial reputation in relation to goods or services according to the standard required by the customer, patient or client. Such imputations, in turn, can deter others from providing claimants with financial funding or accepting employment. [68]

This dichotomy between personal and professional defamation is relevant to the subject of this study since, as Tugendhat J highlighted, defamatory imputations based on involuntary conduct and attracting no moral discredit might nonetheless precipitate not only libel actions but also the misuse of private information. [69]

It is necessary to highlight at the outset that the defamation tort consists of two types: libel and slander. Such a division is predicated upon the way the defamation is committed; if produced in writing and or visual representation then the defamation qualified as libel; conversely, the defamation is slander if it is committed orally. [70] The defamation is classified as a libel if defamatory allegations are reproduced in a permanent form, i.e. books, articles, and letters.[71] Conversely, defamatory words, when made temporarily and audibly constitute a slander. [72] However, the publication of defamatory statements in any type of program, whether radio or television, have all been considered as libel. [73] The distinction between these two forms of defamation has a practical effect upon the respective onus for proving damages. If defamation equates to libel, the reputational harm had been legally presumed, and there is no need to prove injury to reputation, which means libel is an actionable tort *per se*.

[68] Ibid. [33] iii.
[69] Ibid. [35].
[70] Deakin & al. (n 64) 636.
[71] *Monson v Tussauds Ltd, for instance* [1894] 1 Q.B. 671 Lopes L.J. held that 'Libels are generally in writing or printing, but this is not necessary; the defamatory matter may be conveyed in some other permanent form. For instance, a statue, a caricature, an effigy, chalk marks on a wall, signs, or pictures may constitute a libel'.
[72] Deakin & al. ibid. 638
[73] Defamation Act 1952 s. 1 abolished by Broadcasting Act 1990 s. 166.

However, this presumption no more exists since the claimant is currently required to prove the adverse impact on the reputation to consider the imputations in question defamatory according to serious harm requirement enacted by the Defamation Act 2013. [74] Conversely, slander requires the claimant to prove special or actual damage to hold the defendant liable.[75] Nonetheless, until recently there were four (now two) special categories of slander treated similarly to libel concerning the presumption of damage on the grounds that they are 'either so obviously damaging to the financial position of the victim to the point that pecuniary loss is almost certain, or be so intrinsically outrageous that they ought to be actionable even if no pecuniary loss results'. [76] These categories are: an imputation of a criminal offence, [77] imputations 'calculated to disparage the plaintiff in any office, profession, calling, trade or business held or carried on by him at the time of the publication', [78] imputations of unchasteness or adultery regarding a woman or a girl, [79] and imputations regarding the claimant's suffering from contagious or infectious diseases. In this latter category, however, slander only remains in cases where imputation can be shown to cause special damage. [80]

[74] *Lachaux* (n 61)

[75] Ibid. Deakin & al. (n 70) 638.

[76] *Lachaux,* ibid.; Kerr v Kennedy [1942] 1 K.B. 409; Catherine Urquhart, 'Defamation: actionability' (insight) (West Law, September 2015) <https://login.westlaw.co.uk/maf/wluk/app/document?&srguid=i0ad8289e0000016849591d6f298a29c3&docguid=I377FD710EDFD11E296D7C26DBBD3C972&hitguid=I377FD710EDFD11E296D7C26DBBD3C972&rank=1&spos=1&epos=1&td=1&crumb-action=append&context=106&resolvein=true> accessed 1 February 2019

[77] *Gray v Jones* [1939] 1 ALL ER 798

[78] Defamation Act 1952 s. 2.

[79] Slander of Women Act 1891 s. 1 however, this defamatory imputation has been repealed by S. 14 (1) of the Defamation Act 2013.

[80] S. 14 (2); *Lachaux*, ibid.

B- The elements of libel action

There are three constitutive requirements the claimant must establish to bring defamation proceedings against the (harmfully) disseminated allegations complained of: defamatory meaning, the reference to the claimant, and the publication to the third party.

The statement must be defamatory

The touchstone of defamation law, historically speaking, is whether the defendant's allegations could be reasonably interpreted in a defamatory fashion by the recipients; such interpretation depends largely to the words spoken, the context in which those allegations were expressed, and the recipients' previous knowledge, values and background.[81] Elucidation must be achieved by the claimant herself in order to establish the wrongfulness of the defendant's conduct. Merely abusive statements affecting the claimant's own feelings or self-esteem do not fall within the protective scope of defamation even if such abusive statements would injure the relevant person. Abusive statements must, rather, seriously harm the claimant's reputation, namely the esteem that others hold for her. [82] Such serious harms must be assessed and determined according to the criterion of reasonable reader. [83] For example, words uttered when satirising politicians should not be interpreted as

[81] Marc A. Franklin Daniel J. Bussel, 'The Plaintiff's Burden in Defamation: Awareness and Falsity' (1984) 25 Wm. & Mary L. Rev. 825, 828.
[82] *Lachaux* (n 61); Deakin & al. (n 70) 639.
[83] *Jeynes v News Magazines Ltd & Anor* [2008] EWCA Civ 130 [14]. In this case, Sir Anthony Clarke MR explained the reasonable reader: 'The governing principle is reasonableness. (2) The hypothetical reasonable reader is not naïve, but he is not unduly suspicious. He can read between the lines. He can read in an implication more readily than a lawyer and may indulge in a certain amount of loose thinking, but he must be treated as being a man who is not avid for scandal and someone who does not, and should not, select one bad meaning where other non-defamatory meanings are available. (3) Over-elaborate analysis is best avoided. (4) The intention of the publisher is irrelevant. (5) The article must be read as a whole, and any 'bane and antidote' taken together. (6) The hypothetical reader is taken to be representative of those who would read the publication in question. (7) In delimiting the range of permissible defamatory meanings, the court should rule out any meaning which, 'can only emerge as the produce of some strained, or forced, or utterly unreasonable interpretation …' … (8) It follows that 'it is not enough to say that by some person or another the words might be understood in a defamatory sense'.

defamatory since any ordinary and reasonable reader would understand the non-seriousness of such allegations; otherwise, upholding claims would constitute a disproportionate interference with freedom of expression. [84]

The Supreme Court recently added, in addition to a 'reasonable reader approach', a new perspective around determining the meaning of words; the context in which the statement was posted ought to be taken into significant consideration. In *Stocker v Stocker*,[85] Lord Kerr added a new sub-category of the reasonable reader regarding social media publications; Kerr LJ rejected the theoretical and logical grounds for affirming the defamatory quality of Facebook postings since an ordinary reasonable reader would be particularly conscious of the nature of this conversation and the context 'casual medium' in which it was made. The task of determining the meaning of words, that was traditionally reserved for a jury, is now completely placed within the judge's discretion according to the Defamation Act 2013. [86] Such an interpretive faculty could nevertheless still be passed on to a jury at the judge's behest. Non-jury determinations have still not been deployed, based on a consensus that jury trial offers the most efficacious way of determining reasonable readings of allegations complained of. [87] The meaning that the defendant seeks to convey through her statements is largely irrelevant should the ordinary reader infer a defamatory meaning towards the claimant. [88]

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[84] Nicholas J. McBride & Roderick Bagshaw, *Tort Law* (2nd edn, Pearson 2005) 267.

[85] [2019] UKSC 17 [38-43]. Lord Kerr added 'The fact that this was a Facebook post is critical. The advent of the 21st century has brought with it a new class of reader: the social media user. The judge tasked with deciding how a Facebook post or a tweet on Twitter would be interpreted by a social media user must keep in mind the way in which such postings and tweets are made and read'.

[86] S. 11.

[87] Iain Wilson, 'Supreme Court considers social media defamation: context is everything' (Brett Wilson Media Law blog, 9 April 2019) <https://www.brettwilson.co.uk/blog/supreme-court-considers-social-media-defamation-context-is-everything/> accessed 17 April 2019

[88] *Lewis v Daily Telegraph Ltd* [1964] AC 234 [107].

English common law developed three tests based on which the defamatory meaning of the allegations in question ought to be assessed: lowering the claimant's estimation within the eyes of right-thinking members of society generally, being shunned and avoided, and finally being subject to hatred, contempt or ridicule. The principal test for determining the defamatory meaning of defendants' statements is whether such statements lower the claimant in the eyes of right-thinking people generally. [89] The right-thinking person and reasonable person standards were used as two equal measures to adjudicate upon allegations. In *Skuse v Granada Television Ltd*, [90] The Master of the Rolls (Sir Thomas Bingham) adopted the following criteria:

> 'A statement should be taken to be defamatory if it would tend to lower the plaintiff in the estimation of right-thinking members of society generally or would be likely to affect a person adversely in the estimation of reasonable people generally'.

This test reflects the nature of the protected interest 'reputation' that is based on the esteem and external judgment the society holds about an individual's character. [91] The ordinary reader is not only able to understand a joke where intended but s/he can also recognize false innuendo based on the whole context without recourse to specific knowledge. [92] Furthermore, defamation can also be derived from an ostensibly innocuous statement if the reader possesses specialist knowledge known as true or legal innuendo. [93] However, the

[89] *Sim v Stretch* [1946] 2 All ER 1237; *Lewis*, ibid; *Lachaux* (n 61) [6].
[90] [1993] WL 964057
[91] Eric Descheemaeker, 'Protecting Reputation: Defamation and Negligence' (2099) 29 Oxford Journal of Legal Studies 603, 609.
[92] *Lewis* (n 88).
[93] *Cassidy v Daily Mirror* [1929] 2 KB 331.

court must decide only a single meaning even though many distinct meanings could be drawn from the statement in question. [94]

This approach was criticised using the rationale that determination of a uniform meaning within a statement that might conceivably generate ten different meanings in ten different people is an absurd idea, particularly when the publisher is a national newspaper addressing its publication to millions of readers. [95] The reasonableness and right-thinking criteria might be unhelpful in some occasions such as politics and homosexuality; there, the court would avoid including immorality or unethicality within the scope of reasonableness or right-thinking standards whereas individual reputation is fundamentally based upon a moral or ethical judgment decided by a community. [96] According to the test of *shun and avoid*, a statement is defamatory if it leads the claimant to be shunned and avoided within society. Imputations of unchastity, shameful diseases and insanity represent instances of actionable statements within defamation law. In *Youssoupoff v Metro-Goldwyn- Mayor Pictures Ltd,* [97] the Court of Appeal held that an ordinary and reasonable person would shun and avoid a raped woman in the event of diminution of her social reputation and thus consideration is due towards potential imputations of immorality.

[94] *Slim v Daily Telegraph Ltd* [1968] 2 Q. B., [1968] 1 All E. R. 497.

[95] Thomas Gibbons, 'Defamation Reconsidered' (1996) 16 Oxford Journal of legal studies, 587, 601-2; Andrew Scott, ''Ceci n' est pas une pipe': the autopoietic inanity of the single meaning rule' in Andrew Keynon, (eds) Comparative Defamation and Privacy Law (CUP 2016) 40.

[96] *Kerr v. Kennedy* (n 76); Randy M. Fogle, 'Is calling someone 'Gay' defamatory? The meaning of reputation, community mores, gay rights and free speech' (1993) 3 Law & sexuality, 165.

[97] [1934] 50 T. L. R. 587; Eric Descheemaeker, however, challenges the actionability of such imputations under defamation law since publication of such sensitive facts harms the claimant's privacy or dignity whereas defamation law should protect reputational interests. He argues that unavoidable injustices might occur with respect to the claimant, should non-reputational considerations be smuggled into defamation law; for example, if an HIV test result of someone is accurately published without her consent, the victim would be left without redress under defamation law because truth constitutes a complete defence. Such injustice occurs because no principled protection is granted to the interest in question (privacy as Descheemaeker argues) in the first place. Eric Descheemaeker, 'Defamation outside reputation: proposals for the reform of English law' (2011) 18 Tort Law Review 124.

Under the test of *hatred, contempt or ridicule*, in addition, a statement is deemed to sufficiently lower the defamed claimant in the eyes of right-thinking people when it exposes her to hatred, contempt or ridicule. The principle was upheld in the case of *Berkoff v Burchill.* [98] The journalist Julie Burchill made two separate references to the actor Stephan Berkoff as possessing 'hideous ugliness'; these became the subject of a libel action brought by Mr Berkoff, and the court of appeal agreed that such statements constituted defamation because they exposed him to ridicule and lead other to shun and avoid him. However, the simple mockery 'ridiculing a man' cannot be a basis for definitively determining injury to reputation; rather, the action ought to be deemed the actual or potential cause of profound ridicule - namely 'expose him to ridicule' - in order to qualify as defamation. This test, however, might not provide a fair criterion for measuring diminishment of reputation, since the real injury of being exposed to ridicule ('hideous ugliness' in the case of Berkoff) does not lie within diminishment of a person's relative standing within community opinion. Rather, it concerns her dignity and self-worth or image interest; these latter characteristics lie outside of defamation law's protective scope as asserted. [99]

The statement must refer to the claimant

The claimant also needs to establish that the defamatory allegations made by the defendant refer, whether directly or indirectly, to the claimant herself. [100] The direct reference poses no problem because there is no doubt that the defamatory allegations refer to the defamed claimant; conversely, the indirect reference requires a rigorous criterion to decide whether the claimant satisfies this requirement. [101] Problematic situations arise in

[98] [1996] 4 All ER 1008 (CA).
[99] McNamara. (n 62) 179; Geoffrey Robertson & Andrew Nicol, *Media law* (5th edn, Sweet & Maxwell 2007) 127.
[100] Donal Nolan & John Davies, 'Torts and Equitable Wrongs' in Andrew Burrows (eds) *English Private Law*, (3rd edn, OUP 2013) 998-9.
[101]Deakin & al. (n 64) 645.

mistaken identity cases and class-action defamation cases; in these instances, the defendant does not intend reference to the claimant's identity but intends a reference to another real or imaginary person, yet reasonable people would nonetheless understand that such defamatory allegations apply to the claimant. [102] In *E. Hulton Co. v Jones,* [103] for instance, the defendant was held liable for defamation of a barrister named Artemus Jones as a result of this name being used in the defendant's fictional narrative story about a churchwarden in Peckham. The court found the defendant liable because reasonable people who knew the claimant might plausibly interpret the story as referring to the claimant and might consequently think less well of him even though he was not a churchwarden and had never frequented Peckham. The criterion upon which judgements concerning reference to the claimant within publications are arrived at is thus predicated upon whether an ordinary sensible person could, based upon knowledge of the circumstances, reach a conclusion that the defamatory publication indeed refers to the claimant. [104]

The statement must be published to a third party

The final requirement needed to establish the defendant's liability within defamation concerns the publication of defamatory words. The meaning of publication in this regard relates to the communication of a defamatory statement made by the defendant to a third party; this means no libel is committed whilst defamatory materials are made known only to the claimant. [105] Defamation law looks to safeguard the claimant's right to social esteem

[102] McBride & Bagshaw, (n 84) 272.
[103] [1910] AC 20. The claimant awarded £1750 in this case; the same principle has been applied in *Newstead v London Express Newspapers Ltd* [1940] 1 KB 377 when Harold Newstead had been convicted of bigamy and the claimant who was called also Harold Newstead and was 30 years old and worked also in Camberwell sued the defendant for a libel because a reasonable person who knew the claimant would think that the account of trial referred to the claimant.
[104] *Morgon v Odhams Press* [1971] 1 WLR 1239; Deakin & al (n 64) 646.
[105] *Pullman v W. Hill Co. Ltd* [1891] 1 QB 524, 527.

against undue prejudice and it might thereby suffice, traditionally speaking, to communicate the libellous words to one person in order to meet minimum requirements for publication.[106] Nonetheless, there are some occasions in which the communication of defamatory words to a third party cannot be considered a publication: the communication between spouses about another person, [107] a communication between a secretary and manager within the same enterprise containing defamatory words,[108] and communication that does not meet standards of comprehensibility. [109] The existence of a limited number of recipients could constitute a reason to strike down the action because such limitations signal the lack of real and substantial tort as having been committed. In *Jameel v Dow Jones Co. Inc*, [110] the court struck down the action because the claimant abused process when the latter sought disproportionate protection of her reputation which suffered no or minimal harm.

[106] Nolan & Davies, (n 100).
[107] *Wennhak v Morgan* [1888] 20 QBD 635.
[108] *Eglantine Inn Ltd v Smith* [1948] NI 29, 23
[109] If the third party cannot understand the defamatory publication because of disability to read or to hear, there is no publication served the purpose of defamation law see: *Sadgrove v Hole* [1901] 2 K B 1.
[110] [2005] EWCA Civ 75 Lord Philips "We accept that in the rare case where a claimant brings an action for defamation in circumstances where his reputation has suffered no or minimal damage, this may constitute an interference with freedom of expression that is not necessary for the protection of the claimant's reputation. In such circumstances, the appropriate remedy for the defendant may well be to challenge the claimant's resort to English jurisdiction or to seek to strike out the action as an abuse of process…. An alternative remedy may lie in the application of costs sanctions"; See also: *Crossland v Wilkinson Hardware Stores Ltd* [2005] EWHC 481 (QB).

C- The legal presumptions

English common law was described as inherently claimant-friendly due to the legal presumptions underlying the burden of proof defamation claimants are subject to. Some of these presumptions are open to rebuttals such as falsity and malice. [111] Whereas the recent development of defamation law in light of Defamation Act 2013 changed the longstanding presumption of damage as defamation was actionable tort *per se*. The reputational harm is no more presumed since the claimant must prove the serious impact on her reputation caused by the defendant's allegations in order to be defamatory. [112]

Presumption of falsity

If the court upholds the defamatory quality of the imputations in question, there is a presumption that such defamatory imputations were false and thereby the claimant does not need to establish the falsity of the defamatory imputations. However, in order to avoid liability, the defendant could rebut such presumption and prove the truth of the defamatory imputations. [113] Nonetheless, the mere falsity of the defendant's statement cannot form the basis for libel action unless the untrue statement lowers the defamed person in the eyes of right-thinking people generally. [114] The Joint Committee on the Draft Defamation Bill states that 'The burden of proving that the material is defamatory lies with the claimant. However,

[111] However, if the reputational damage was minimal or the claimant had a bad reputation, these could be mitigating factors to measure the damages. See: David J. Acheson & Ansgar Wohlschlegel, 'the Economics of Weaponized Defamation Lawsuits, (2018) 47 Sw. L. Rev. 335,341.

[112] It might be mention that such claimant-friendly presumptions were considered as the chief causes of unacceptable chilling effects upon freedom of expression within the English jurisdiction compared with the American defendant-friendly jurisdiction as will be elucidated below. Acheson and Wohlschlegel, (n 111) 340.

[113] Ibid. 340-1.

[114] Geoffrey Robertson & Andrew Nicol, *Media Law* (4th edn, Penguin Books 2002) 80.

the claimant is not required to show that the material is false; there is a rebuttable presumption that this is the case and it is for the defendant to prove otherwise'. [115]

The Joint Committee declined to change the claimant-weighted falsity presumption in order to follow the defendant-friendly U. S Law. [116] To follow the American law, the falsehood presumption in English law was academically criticised because it produces chilling effects upon free speech rights because such presumption deters people from freely criticising matters of public concern, and it consequently places a disproportionate restriction upon free speech due to the difficulty in meeting the burden of proof to overcome the falsity presumption. [117] However, Strasbourg Court rejected this plea, and it reaffirmed the compatibility of falsity presumptions with Article 10 ECHR on the grounds that the defendants could not only avail themselves of the truth defence but also because they should bear onus to justify harms caused to an individual's reputational interests. [118]

Presumption of malice[119]

The standard of liability in defamation tort is strict; the defendant cannot escape the liability of her defamatory publication by proving the absence of fault through demonstrating

[115] Ministry of Justice, *Draft Defamation Bill: Consultation* (Consultation Paper CP3/11, March 2011), Annex E Introduction.

[116] In US law, contrary to English law, the truth of the defendant's allegations is legally and refutably presumed, and it is incumbent upon the claimant to establish the falsehood of those words as well as their defamatory meaning. The basis of truth as an absolute defence presumes the accuracy of the defendant's allegations, whereby such a presumption places the burden to prove the falsehood of those allegations upon the claimant in bringing libel actions. See: Elizabeth Samson, 'The Burden to Prove Libel: A Comparative Analysis of Traditional English and U.S. Defamation Laws and the Dawn of England's Modern Day' (2012) 20 Cardozo Journal of International and Comparative Law 771, 777.

[117] Paula Giliker, *The Europeanisation of English Tort Law,* (Hart Publishing 2014) 134-5.

[118] *Wall Street Journal Europe SPRL v UK* (28577/05) (2009) 48 EHRR SE19; Giliker, ibid. 135.

[119] The US law, contrary to the English law, adopts a fault-standard liability in respect to the defamation actions brought by public officials and public figures. In *New York Times Co. v. Sullivan*, the Supreme Court decided that proving the falsehood and defamatory quality of a publication was insufficient to protect freedom of expression if the claimants were public officials. The truth defence itself could prove inadequate for the purposes of allowing people to voice their criticisms in subjects of genuine public interest. Thus, public officials, in order to bring defamation actions, are required to prove the fault within the defendant's conduct (actual malice) in which the latter either knows the falsehood of her allegations or recklessly disregarded the need to corroborate the

plausible non-awareness of the claimant's existence at the time of dissemination. [120] Malice is primarily presumed once the defamatory quality of imputations becomes judicially upheld; however, such presumption could be defeated by proving the defendant's absence of malice. One instance of this would be where defamation relates to reference to provocation, [121] offering an initial defence that can only be overturned through proof of the defendant's knowledge of falsity or recklessness regarding truth/falsity provided by the claimant in a follow-up. In the defamation context, the defendant's previous knowledge, or recklessly suspicion of the falsity of defamatory publications represents the specific meaning of malice, which generally means an ill will, spiteful intent or improper motive. [122] The defences of honest opinion (fair comment) and qualified privilege, however, could rebut the presumption of malice. [123] These defences seek to allow people to speak their mind freely without the fear of being held liable for their speech. Nonetheless, the claimant could also defeat such defences if she or he could prove the malicious motive of the defendant's allegations. [124]

Presumption of reputational damage

Defamation (libel) was classified as an actionable tort *per se* since reputational harm is irrefutably presumed even if no such harm occurred because nobody assented the

respective truth or falsity of such allegations. it is ruled that 'Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is, in fact, true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which "steer far wider of the unlawful zone."... The rule thus dampens the vigour and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments'. See: New York Times Co. v. Sullivan 376 U.S. 254 (1964) at 279.

[120] Descheamarker, (n 91) 626

[121] Acheson and Wohlschlegel, (n 111) 340-1

[122] Robertson & Nicol, (n 99) 110.

[123] There is also a controversial debate about the role of malice to defeat the defence of publication on matter of public interest. See chapter 5.

[124] Paul Mitchell, 'Duties, Interests, and Motives: Privileged Occasions in Defamation' (1998) 18 Oxford J.L. S. 381; Descheamarker, ibid.

defamatory imputation. [125] However, section 1 (1) of Defamation Act 2013 requires that in order to for publication to be deemed defamatory, it caused, or will be likely to cause, serious harm to the claimant's reputation. This newer definitional requirement challenged the longstanding view of defamation according to which reputational harms were automatically presumed if published statements were considered defamatory. [126]

In *Lachaux v Independent Print Ltd,*[127] Warby J radically reinterpreted the meaning of serious harm, in line with this new requirement, and rejected the longstanding legal wisdom that Libel is an actionable tort per se. His Honour held that the serious harm requirement raised the bar for bringing an action, and thus it required a new threshold of proof relating to reputational damage than that previously upheld within the authorities of *Jameel,* [128] and *Thornton.* [129] According to such a new interpretation, the likelihood test of S. 1(1) of Defamation Act 2013 requires either demonstrate this more stringent standard of serious harm done to their reputation, or the probability of serious harm being caused by. [130] The court of appeal, however, rejected Warby J's interpretation upheld the longstanding view of libel as an actionable tort *per se.* [131]

[125] Such presumption has been approved by the draft Defamation Bill 2011 'Libel is currently actionable without proof of actual damage. This means that if a statement can be shown to be defamatory (broadly that it tends to lower the reputation of the claimant in the estimation of right-thinking members of society), it is presumed that the claimant has suffered damage as a result of the publication, and he or she does not need to prove that this is the case' see: Ministry of Justice, (n 115) Introduction; Descheamarker, ibid. 613.

[126] Alastair Mullis & Richard Parkes, *Gatley on Libel and slander* (Sweet & Maxwell 2013) at para. [1.5]; Thomas DC Bennett, 'Why so serious? Lachaux and the threshold of 'serious harm' in section 1 Defamation Act 2013' (2018) 10 Journal of Media Law.

[127] [2015] EWHC 2242 (QB)

[128] In *Jameel* (n 110), a substantial tort is required to bring defamation action to vindicate the injured interest of reputation; therefore, the action should be struck out if damages awarded are significantly disproportionate to the litigation costs which also make a disproportionate interference with the Defendant's freedom of expression in Article 10 ECHR.

[129] In *Thornton* (n 63*)* Tugendhat J ruled that in order to bar trivial claims, defamatory statements must pass the seriousness threshold according to which a statement is defamatory if other people's attitude towards him/her is substantially affected in an adverse manner or has a *tendency* to do so.

[130] Ibid. [60]

[131] *Lachaux*, (n 127).

Courts, therefore, have refused to apply the same meaning of likelihood test as that utilized within S. 12 (3) HRA 1998 applied in *Cream Holdings Limited v Banerjee* to cases dealing with defamation law, since the two meanings have different purposes in different contexts. [132] Consequently, the meaning of likelihood test of s. 1(1) D. A. 2013 may be read as corresponding to that definition of *tendency* as applied in Thornton. [133] The presumption of damage there is a question of policy, premised upon empirical foundations, of what may ordinarily be defined as causing a loss of reputation.[134] Bennett argues that Warby J's interpretation of likelihood test may cause more problems instead of providing a means by which to preclude trivial claims. He holds that such an interpretation would affect any determination of the one-year limitation period traditionally commencing from the date of publication; according to Warby J's interpretation, this period would commence instead from that time when the occurrence of serious reputational harm first occurs. [135] Moreover, since adducing proof of serious harm may increase the costs and length of civil proceedings, a case cannot be made for Warby J's interpretation serving to improve the efficiency of civil justice systems. [136] However, Bennett, contrary to the Court of Appeal ruling, believes that libel, technically speaking, is non-actionable *per se* tort because a claimant needs to provide some proof of damage even though s/he could potentially draw an inference establishing libel claim. [137] The Supreme Court, consistently with Bennett's view, ruled that the determination of serious harm requirement imposes a further threshold of adversely factual impact on the reputational interest beyond those envisaged in *Jameel* and *Thornton* authorities. [138]

[132] Ibid. [47].
[133] Ibid. [49].
[134] Ibid. [59].
[135] Bennett (n 126) 11.
[136] Ibid. 13.
[137] Ibid. 11 & 13.
[138] *Lachaux*, (n 61) [12].

2. 3: The overview of Privacy tort

This section briefly explores the development of English privacy law, and it focuses on the main cause of action through which privacy is nowadays protected. The emergent cause of action relating to misuse of private information (MOPI) represents the successful result of judicial and academic efforts undertaken over decades to achieve independent protection of the right to privacy based on Article 8 ECHR.

A- The protection of privacy in English law

To begin with, it is important to point out that there is no single overarching definition of privacy.[139] Alan F Westin's definition of privacy is the right to determine when, what, and how personal information is communicated to others. [140] This meaning of privacy relates to subjective appreciation which could be widened or restricted according to the individual need for comprehensively achieving self-realization.[141] Privacy is a significant means for achieving different functions: it seeks to achieve personal autonomy because it helps to avoid being manipulated, dominated, or exposed by others.[142] Furthermore, it could also achieve an emotional release, since privacy protects that personal space which allows opportunities for emotional release from the tensions of social life. [143] Self-evaluation could be also met, because privacy grants the individual the exclusive power to decide what, when and how her private information should be disseminated. Therefore, privacy permits deciding how to

[139] Maria Tzanou, *The Fundamental Right to Data Protection: Normative Value in the Context of Counter-Terrorism Surveillance* (Oxford, Hart Publishing 2017)
[140] Alan F. Westin, *Privacy and Freedom* (Atheneum 1967) 7.
[141] Nicole Moreham's definition of privacy, like Westin's view, is built upon the individual desire to determine the scope of privacy and its boundaries. Moreham's view of privacy is 'the state of desired 'inaccess' or 'freedom from unwanted access'. The scope of privacy, whether informational or physical, could be enlarged or restricted according to the individual's wish and her desire to keep activities, events, places or information outside access, namely private. See: Nicole, A. Moreham, 'Privacy in the common law: a doctrinal and theoretical analysis' (2005) 121 LQR 628, 635; Nicole A. Moreham 'Beyond information: physical privacy in English law' (2014) 73 CLJ 350.
[142] Westin, Ibid. 14.
[143] Ibid.

integrate experiences into meaningful patterns for the purposes of achieving self-evaluation.[144] Privacy may also allow the individual to draw her interpersonal boundaries and trusted people with whom the personal information is shared.[145]

Daniel J Solove's view on privacy is based on recognising four categories of privacy invasions.[146] Firstly, privacy is breached through information collected through unauthorized surveillance which adversely affects the individuals' behaviours due to the potentially chilling Panopticon effect. Secondly, privacy is breached in the event of private information being processed and analysed without consent, in turn revealing certain private facts contrary to the individual's expectations. Thirdly, privacy could also be breached should private information be disseminated without authorization, since this allows exposure of many physical and emotional attributes and consequently causes potential embarrassment and humiliation. Finally, privacy is invaded if the individual's seclusion (namely solitude) is intruded upon.

The comparison of such views is beyond the focus of this thesis; however, one may deduce from such explanations that the core of privacy concept relates to the protection from unauthorised publication or intrusion into an individual's private life. This meaning could be recognised within the development of English privacy law under MOPI which may subsume the protection of information and physical privacy. The protection of privacy in English law

[144] Ibid.

[145] Contra Westin and Moreham' enlarged approaches, Raymond Wacks argues that privacy-protective scope ought to be limited to the protection of private facts instead of the information giving rise to an expectation of privacy since privacy right is predicated upon "safeguarding of private facts". See: Raymond Wacks, Privacy and Media Freedom (2013 Oxford University Press) 238.

[146] Daniel J Solove, Understanding Privacy (Harvard 2009) 10; Daniel J Solove A Taxonomy of Privacy (2006) 154 U. Pennsylvania LR 477, 536.

shifted from denying the existence of any direct protection of personal privacy through to the establishment of privacy tort.

In *Kaye v Robertson and Anor,*[147] the court of appeal mentioned the failure within English law to provide effective and direct protection of the right to privacy. In this case, the claimant, who was a well-known actor, claimed that he was interviewed and photographed without his consent during his stay in a private hospital recovering from his serious injuries. The claim was brought under causes of action relating to malicious falsehood, libel, passing off and trespass to the person, an interlocutory injunction was granted with regards to the defendant's false allegation that the photograph had been taken and interview conducted with the claimant's consent; however, this injunction did not prevent the publication of the claimant's hospital photographs. The court of appeal upheld the absence of any actionable right to privacy within English jurisdiction. Glidewell L. J's asserted that: [148]

> 'it is well-known that in English law there is no right to privacy, and accordingly, there is no right of action for breach of a person's privacy. The facts of the present case are a graphic illustration of the desirability of Parliament considering whether and in what circumstances statutory provision can be formulated in such a way as to protect the privacy of individuals'

This principle was reiterated in *Wainwright v Home Office* [149] when the House of Lords rejected the claimant's argument concerning the need for a general tort of privacy to fill the gap of absence of effective remedy to protect privacy based on the Human Rights Act 1998. It was also held that English law provides adequate protection for individuals from unwanted

[147] [1991] F.S.R. 62
[148] Ibid.
[149] [2003] UKHL 53 per Lord Hoffman [33-53].

intrusion into their private lives through having devised and upholding the equitable action of 'breach of confidence'[150] because of governmental unwillingness to introduce direct privacy legislation, protection of privacy was judicially implemented via the equitable confidence action, utilizing a piecemeal and judicially dissatisfactory approach formulated in light of the European Court of Human Rights decisions. [151] In order to protect private information (privacy) under equitable action, three requirements had to be satisfied: firstly, the information must be confidential; secondly, it must be imparted in circumstances connoting an obligation to preserve confidentiality; and finally, it must be disclosed or otherwise used without authorization.

B- Misuse of private information (MOPI)

Privacy right in English jurisdiction involves two main components: confidentiality (secrecy) and intrusion. In *Goodwin v News Group Newspapers Ltd,* [152] Tugendhat J explicated these respective concepts; the former refers to the unwanted access to private information whereas the latter to the unwanted intrusion into personal space. This bifocality underpinning privacy rights was reaffirmed by the Supreme Court in *PJS v MGN Ltd* [153] when the majority of Lords agreed upon intrusion as forming a joint basis for privacy claims besides the pre-established concept of confidentiality. Nonetheless, Moreham argued that the new action of misuse of private information focuses on only one of these aspects; MOPI protects the claimant from the unauthorised dissemination of private information or images (informational privacy). [154] She calls for recognising a separate cause of action which protects

[150] Ibid. [32]; *Earl Spencer v United Kingdom* 25 EHRR CD 105.
[151] Section 2 (1) HRA 1998; Giliker, (n 117) 174.
[152] [2011] EWHC 1437 (QB) [85].
[153] [2016] UKSC 26 [58].
[154] Nicole A. Moreham, 'Intrusion into physical privacy' in Nicole A. Moreham & Sir Mark Warby, (eds) Tugendhat and Christie: The Law of Privacy and the Media (3rd edn, Oxford University Press 2016) 455; N A Moreham, (n 141)

the individual from unwanted intrusion into their physical privacy, under which unauthorised watching, listening or recording become actionable in themselves. [155]

The focus of physical privacy actions relates to the deliberate and unauthorised watching, listening and recording of personal information, irrespective whether the information acquired in the course of such activities were disseminated. [156] The scope of protection of physical privacy only concerns the activities of a private nature or activities occurring in private places such as private residences or in bathrooms. Nevertheless, the protection might also cover serious physical intrusions committed within public places unless any such watching (spying), listening and recording activities are adjudged by the court to be necessary in the course of exposing wrongful behaviours. [157]

Informational privacy (MOPI) and physical privacy actions could conceivably coexist in respect of the unauthorised publication of intimate conversation obtained through phone hacking because the unauthorised publication triggers an informational privacy whereas the mere fact of phone hacking gives rise to a physical privacy. [158] Nonetheless, Moreham endorses the judicial extension of MOPI action to encompass both the informational and physical facets of privacy right citing Mann J's recognition of three categories of interference with the right to privacy in *Gulati v MGN Ltd*: [159] wrongful listening (hacking), obtaining via private investigators and publication of private information. In this case, eight celebrities claimed that their privacy had been breached over years via phone interceptions conducted

[155] Ibid.
[156] Moreham, (n 141) 375.
[157] Nicole A. Moreham, 'Privacy in public places' (2006) 65 Cambridge Law Journal 606.
[158] No question of a problematic overlap and double compensation once both actions are kept analytically distinct and independent, Moreham, (n 141) 377.
[159] [2015] EWHC 1482(Ch) [13]; Moreham, 'Liability for listening: why phone hacking is an actionable breach of privacy' (2015) 7 J. O. M. L. 155, 166.

by journalists employed by the defendants (Mirror, Sunday Mirror and People). [160] Mann J awarded damages under three heads: firstly, the fact of general hacking activities; secondly, the fact of obtaining private information by private investigators; and finally, the publication of private information obtained by wrongful hacking activities.[161]

The new dimension of privacy protection in English law under MOPI involves observing, intercepting and recording private conversations, and domestic activities exposing private parts of the body unless such interferences serve a legitimate purpose in terms of exposing harmful or wrongful behaviours. [162] MOPI, therefore, protects those places, activities and information in respect of which an individual has a reasonable expectation of being kept private and free from intrusion. However, physical privacy is beyond the purpose of this study, which will focus only on informational privacy based on the unauthorised publication of private information since the publication is one of the defamation law's core elements and eventually no overlap between defamation and privacy is conceivable in practical ruling without the dimension of publication. [163]

The stages of MOPI action were established within the landmark case of *Campbell v MGN*. [164] These consist of reasonable expectation of privacy test, and ultimate balance (proportionality) test. The failure of the first test identifying any reasonable expectation of

[160] *Gulati,* Ibid.
[161] Ibid. [12-3]
[162] Moreham, (n 159) 166-7; Moreham, (n 141) 377.
[163] It is instructive to indicate that many scholars emphasised on the capacity of MOPI to provide appropriate protection of privacy whether for informational or physical invasions and there is no need to create a separate cause of action to protect the individual from an intrusion into her seclusion. Paul Wragg, 'Recognising a privacy-invasion tort: the conceptual unity of informational and intrusion claims' (2019) Cambridge Law Journal, 1; John Hartshorne, 'The need for an intrusion upon seclusion privacy tort within English law' (2017) 46(4) Common Law World Review, 287.
[164] (n 5) per Lord Nicholls of Birkenhead [21].

privacy entails the end of action without taking into consideration the second test being conducted.[165]

Reasonable expectation of privacy test

In order to consider the defendant's action as an infringement to the right to respect for private life based on Article 8 ECHR, the claimant must establish that their expectations around non-disclosure regarding the information were reasonable. This test represents what Lord Nicholls of Birkenhead identified in *Campbell v MGN Ltd,*[166] as the touchstone of MOPI. The Court of Appeal in the landmark case of *Campbell* rejected the claim that disclosure of claimant treatment details and pictures of her leaving Narcotics Anonymous 'would be highly offensive to a reasonable person of ordinary sensibilities'. [167] The House of Lords, however, rejected the 'highly offensive' test on the grounds that such a test had no basis within Convention jurisprudence; instead, based on Article 8 jurisprudence, English courts should ask 'whether in respect of the disclosed facts the person in question had a reasonable expectation of privacy'. [168] This is an objective test to determine whether and when information of a strictly personal nature relating to sexual, health, financial, family or domestic issues falls within the domain of reasonable privacy expectations. [169] The nature of the disclosed information plays a central role in the first stage of a privacy claim; the test of the reasonable expectation of privacy would often be engaged in the event of information in

[165] *Higinbotham (formerly BWK) v Teekhungam* [2018] EWHC 1880 (QB); [2018] 7 WLUK 507, in this case the high court upheld the striking out of a claim for misuse of private information, breach of confidence and breach of the Data Protection Act 1998; it was an abuse of process under the principle in Jameel v Dow Jones & Co because the claimant had no real prospect of success due to his failure to establish his reasonable expectation of privacy regarding a profile on the social media site "Facebook" revealed that the claimant had a second family, see para. [71].
[166] (n 5)
[167] *Campbell v MGN* [2002] EWCA Civ 1373 [54-5].
[168] *Campbell*, (n 5) [22], [21] and [94].
[169] *The Author of a Blog v Times Newspapers Ltd* [2009] EWHC 1358 (QB) [9].

question dealing with health matters,[170] personal and sexual relationships,[171] and home-life. [172] Successful engagement of this test is also connected to the form the information takes, such as photographs,[173] text messages,[174] personal opinions written in handwritten journals,[175]or a diary piece. [176]

Overall, the court, in order to determine whether there is a reasonable expectation of privacy, must take into consideration all the relevant circumstances. These include the claimant's attributes; the nature and the place of the engaged activity; the nature and the purpose of the publication or intrusion; the claimant's implicit or explicit non-authorisation; the effect of the intrusion on the claimant; the circumstances and the purposes allowing the publisher to have the information; the way and the form in which the information was stored and communicated; and the claimant's courting of, or failure to court, publicity. [177] Based on the legal authorities of MOPI, Moreham identified seven categories of information or activity which most reasonable people would classify as private. [178] The first of these relates to matters concerning the physical body such as functional defects or nakedness. In *Campbell v MGN*, [179] the publication of covertly taken photographs depicting the claimant, together with details of drug addiction treatment, were held to constitute unjustified interference with a person's right to privacy. The second category concerns matter related to sexual life and

[170] Campbell, (n 5) [155].
[171] *Mosley,* (n 33)
[172] *McKennitt*, (n 12)
[173] *Campbell*, (n 5) [31] per Lord Nicholls.
[174] *Ferdinand v MGN Ltd* [2011] EWHC 2454 (QB).
[175] *HRH Prince of Wales v Associated Newspapers Ltd* [2008] Ch 57, [35].
[176] *Trimingham v Associated Newspapers Ltd* [2012] EWHC 1296 (QB) [305].
[177] *Murry v Express Newspapers Plc* [2008] EWCA Civ 446. Some of these factors, such as the claimant's attributes, and the purpose of the intrusion were regarded as the main factors for determining the feasibility of any public interest defence and they should be approached through the proportionality test instead of the reasonable expectation of privacy test. See: Nicole. A. Moreham, 'unpacking the reasonable expectation of privacy test' (2018) Law Quarterly Review.
[178] Ibid.
[179] *Campbell* (n 5) [145]

activity. In *Mosely v NGN*, the defendant (a national newspaper) was held to have breached the claimant's Article 8 ECHR rights [180] by having exposed the claimant Mosley's sadomasochistic practices and other sexual activities conducted between Mosley and consenting adult females. The third category concerns personal relationship details. [181] The fourth category is relevant to the family or domestic intimacies. [182] The fifth relates to the suffering of grief or emotional pain. [183] The sixth is concerned with an individual's mind, its contents and states, for instance, emotions, fantasies or dreams. [184] The final category relates to the observation of an individual's daily life. [185] However, it should be noted that the mere correspondence to these categories does not technically qualify information for automatic classification as 'private'; rather, this classification becomes operative in the event of the legal system ruling that exposure of the information in question would cause the individual to suffer embarrassment and humiliation.[186]

Eric Barendt argues that the actual test for what constitutes a reasonable expectation of privacy –what he terms a 'ritual incantation' - is unnecessary, incoherent and redundant; the claimant's privacy rights under Article 8 ECHR are simply engaged when the information or activity in question is obviously private. [187] Barendt's arguments are based upon evaluating the undesirable consequences of applying this test in English courts; he argues that this test cannot guarantee effective privacy rights protection for celebrities, even though their expectations to keep the private information were reasonable, on the basis that they have

[180] *Mosely* (n 33) [98]; *PJS* (n 154) [32].
[181] *Gulati* (n 159) [229 IV], [530] & [578]; McKennitt (n 12) [31& 26].
[182] *Murray* (n 177) [55]; McKennitt, ibid. [22].
[183] *Peck v UK* [2003] ECHR 44; *CVB v MGN* [2012] EWHC 1148 (QB).
[184] *Gulati*, ibid. [386] and [593] and [667]; *McKennitt*, ibid. [20].
[185] *Murray,* ibid. [57].
[186] Moreham, (n 177).
[187] Eric Barendt, 'problems with the reasonable expectation of privacy test' (2016) 8 Journal of Media Law 129, 134.

demonstrably previously courted the media. [188] Furthermore, this test involves an elided presupposition that any claimant pursuing an action must have previously held some reasonable expectation of privacy even though circumstances dictate that certain claimants would not be in possession of any such expectation prior to privacy infringement; such lack relates to lack of formal capacity such as in the case of child claimants. [189] If the court depends on the parents' expectations, as applied after *Murray*, to determine whether the child's right to privacy was engaged, this could lead to unjustifiable denial of such rights simply on the grounds that the parents in question had courted publicity. [190]

This conclusion is not only bizarre but constitutes a very unattractive and artificial concept which allows carte blanche sacrifice of the child's right to privacy on the grounds of parents' previous conducts. [191] Moreover, and most problematically, a test for a reasonable expectation of privacy test involves a double counting of determining factors used which weakens the claimant's expectation of privacy on one hand and strengthens the defendant's freedom of expression on the other hand. [192] For example, both the attributes of the claimant and the purpose of the intrusion are factors listed within the *Murray* case for the purposes of determining what constitutes a reasonable basis for privacy expectations. However, both factors could be applied during the second stage of proportionality in order to assess the relative defendant's exercise of freedom of expression rights and whether these potentially

[188] Eric Barendt, 'A reasonable expectation of privacy: A coherent or redundant concept? In Andrew T. Kenyon (eds), *Comparative Defamation and Privacy Law* (CUP 2016) 106-7.
[189] Ibid. 107.
[190] This approach has been applied in *AAA v Associated Newspapers Ltd* [2012] EWHC 2103 (QB) when Mrs Justice Nicola Davie considered the Claimant's mother's previous attitude towards the claimant's paternity is a highly relevant factor to assess the expectation of privacy test by saying: 'I find that the conduct of the claimant's mother as identified in the above paragraph demonstrates at the least, an ambivalence towards, and an inconsistent approach, with her stated aim in these proceedings'
[191] Barendt, ibid. 108.
[192] Ibid. 109.

superseding the claimant's right to privacy. In such circumstances, the exercise of free speech exercise would be adjudged to genuinely serve the public interest. [193] In addition, the actual test implies the existence of a real risk that the claimant's right to privacy will be denied, subject to being unable to prove the reasonableness of their claim; this task might be adjudged particularly difficult in the context of an environment in which great media publishers operate, publishers who *must advocate* for expansive freedom of expression. [194] Finally, this test might lead to the unstable and transient application of the law since the boundaries of private life are especially susceptible to speedy cultural and social change around matters such as homosexuality and bisexuality, whereby it is at the judge's total discretion as to when analogous changes occur. [195]

Assessment of these arguments and the repercussions they detail leads Barendt towards abandoning the 'ritual incantation' test in favour of adopting an objective test of 'obviously private' as applied in Strasbourg jurisprudence. This test allows us to decide whether the claimant's right in Article 8 ECHR can be legitimately activated and whether the legislature is the best tool to decide and revise matters relating to privacy for the purposes of privacy tort.[196] The rejection of the reasonable expectation test is reinforced by the comparison with reputation and freedom of expression rights protected within defamation law. The courts do not check whether the defamed individual has a reasonable expectation of protection for her reputation or whether the defendant has a reasonable expectation of exercising her freedom of expression. [197] This rejection might, in turn, open the floodgates for trivial claims to be brought in respect of publications describing celebrities' headaches or

[193] ibid. 110; Barendt, (n 187) 134-5.
[194] Barendt, (n 188) 114.
[195] Barendt, ibid. 110.
[196] Ibid. 112.
[197] Ibid.

heavy colds; nonetheless, trivial or anodyne claims could be easily avoided, as Barendt argues, through the imposition of a 'non-triviality or seriousness' requirement in order to establish the existence and degree of wrongful interference with privacy rights in the course of private information publications. [198] However, this requirement is a relevant factor which should not be applied along with the same principles as those tests for 'serious harm' within defamation law. This difference is decisive when determining whether the published information was defamatory for the purpose of libel law since the principle of privacy rights upon which this operates signifies that the individual must be able to secure this right, whether by an injunction or nominal damages, even though the revelation of her personal relationships or health information would unlikely cause serious harm. [199]

The ultimate balancing (proportionality) test

If the claimant successfully passes the first stage test relating to the reasonable expectation of privacy, the court must balance the rights inherent in Articles 8 and 10 ECHR and decide which competing right outweighs the other. In other words, the court's judgement seeks to strike a balance between the right to privacy and the right to freedom of expression. [200] To strike such a balance, the court ought to weigh the public interest in maintaining confidence (privacy) against a countervailing public interest favouring disclosure (freedom of expression).[201] As a counterpoint, it is germane to consider that the Strasbourg Court explicitly identified in *Von Hanover* (No. 1) a 'contribution to a debate of public interest' as the main factor in balancing the competing rights. [202] Other circumstantial factors could

[198] Ibid. 113.
[199] Ibid. 114.
[200] *Campbell* (n 5) [36] & [84].
[201] Ibid. [85].
[202] *Von Hannover v. Germany* Application no. 59320/00 [ECHR 294, 24 June 2004]) para 76; Rebecca Moosavian argues that the conflicting rights in Articles 8 and 10 ECHR were formulated in politically manipulatable terms which do not offer any conceptual guidance for dealing with such conflict. See: Rebecca Moosavian,

strengthen the weight of cumulative privacy or free speech claims, such as 'the claimants were well known and the subject of the report' and matters relating to 'prior conduct of the person concerned'. [203] Therefore, the 'public interest' is the fundamental concept of the balancing process of rights in Article 8 and 10 ECHR. The defendant's right to freedom of expression outweighs the claimant's privacy right if the publication serves the public interest, whereas the latter right would be privileged if no public interest was served by the former's publication. [204] Nonetheless, children occupy a special position within the balancing test because the principle of 'in the child's best interests' has primacy even at the risk of adverse publicity due to their parents' previous behaviours. [205]

It is established that political expression is due to stronger legal protection in comparison with, and superseding, rights to artistic and commercial speech. [206] In *Von Hanover* (No. 1), the Strasbourg Court decided that the unauthorized publication of daily life pictures infringed Princess Caroline's right to privacy on the grounds that there existed no public interest grounds which would justify such interference in an individual's private life right. [207] In ruling this way, the Strasbourg Court rejected broader potential interpretations of what constituted the public interest which might encompass information satisfying the curiosity of the public in relation to public figures who perform no official functions. [208] Political speech relating to politicians or political process could strengthen claims of freedom of expression in this

'Deconstructing 'Public Interest' in the Article 8 vs Article 10 Balancing Exercise'. (2014) 6 (2). Journal of Media Law, 234, 242.

[203] *Axel Springer* (n 5) [90]-[95]; *Von Hannover (n 5)* [108]-[113].

[204] Moosavian, ibid. 243; The meaning of public interest concept will be discussed in detail in chapter 5.

[205] Mark Warby, Adele Garrick & Chloe Strong, Misuse of private information in Nicole A. Moreham & Sir Mark Warby, (eds) Tugendhat and Christie: The Law of Privacy and the Media (3rd edn, Oxford University Press 2016) 266.

[206] *Campbel*l (n 5) [117]; *Handyside v United Kingdom* (1976) 1 EHRR 737

[207] *Von Hanover*, (n 5) [76].

[208] Ibid. [65]

balancing stage. For instance, in *Plon (Société) v France,* [209] the Court held that the publication of sensitive information of politicians' health problems could be justified since there existed a discernible public interest in the disclosure of such information; that is, such revelations provide the public with an opportunity to discuss and determine the suitability of those politicians for taking up or continuing to perform public functions. The European Court thus found the permanent injunction, ordered by the domestic court to prohibit the publication of a book containing private information on the health of ex-president of France Mitterrand, to represent disproportionate interference with Article 10 ECHR. [210]

Through the subsequent cases of *Von Hanover* (No. 2) and *Axel Springer,* Strasbourg jurisprudence arrived at and provided more detailed criteria for performing this balancing test as detailed through. The former case concerned the publication of photographs showing Princess Caroline walking with her husband in the street during their skiing holiday; this photograph was published in an article about the regression of health of Monaco's Head of State. [211] The Strasbourg Court affirmed the contribution towards a debate over what constituted the general public interest which was made by: (a) the publication of these non-offensive photos in question; and (b) the subsequent defence linking the photographs with of the Monaco Prince's illness in order to publicly show how the members of royal family reconcile their familial duties and private life.[212] The Court enlarged the notion of public figures to include those publicly well-known as clearly delineated from to those private

[209] (2006) 42 EHRR 36.
[210] Ibid.
[211] *Von Hanover*, (n 202)
[212] Ibid. [118].

individuals who are publicly unknown and who may thus claim protection over their right to private life. [213]

The Strasbourg Court reaffirmed the criterion of a well-known individual as a justification to invade his private life within *Axel Springer v Germany*. [214] The case concerned publicity surrounding the public arrest of a famous television actor accused of possessing cocaine. The Court found that reporting criminal proceedings genuinely constituted a contribution towards a debate over the general interest. [215] In addition, the status of the subject of the publication has significant relevance in terms of strengthening claims over freedom of expression because: [216]

> 'the applicant company's interest in publishing the articles in question was solely due to the fact that X had committed an offence which, if it had been committed by a person unknown to the public, would probably never have been reported on'

Furthermore, the court indicated that the prior conduct of the person concerned should be taken into consideration when balancing the conflicting claims of articles 8 and 10 ECHR. Protection of private life may be reduced should the individual concerned have sought the limelight by revealing to the press details about her private life. [217] The Court also added the factors of obtaining the information and its veracity in balancing the weight of claims activated through article 10 ECHR versus the claims of a privacy protected under article 8 ECHR. The court found the fact that the publisher was acting in good faith, and thereby provided accurate, reliable and precise information, should be taken into account when

[213] Ibid. [110].
[214] (n 203).
[215] Ibid. [96].
[216] ibid. [99-100].
[217] Ibid. [101].

balancing the conflicting rights. [218] In addition, the content, form and consequences of the publication were considered by the court in assessing the strength of the claims and which should be outweighed by the other in the process of adjudication. [219] Finally, the court considered the impact of sanctions imposed upon the exercise of freedom of expression and whether such sanctions potentially create a chilling effect on such rights[220]. The identification of these criteria was welcomed within the academic analysis and deemed a forward step in providing the domestic courts with detailed guidance for grappling with the task of guaranteeing proportionality within the process of balancing article 8 and 10 ECHR. [221]

The English HRA 1998 and domestic courts in pre-Campbell cases granted freedom of expression rights presumptive priority over other competing interests; in other words, privacy interests were interpreted as a restriction, contingently allowed, upon that freedom of expression necessary within a democratic society and safeguarded under Article 10 (2) ECHR.[222]

In *Campbell v MGN*, the House of Lords expressly applied a new method predicated upon asserting and maintaining the equality of these competing rights; namely 'the competition between freedom of expression and respect for an individual's privacy. Both are vitally important rights. Neither has precedence over the other'. [223] In the landmark case of *Naomi Campbell,* the majority held that the defendant's publication of the claimant's medical treatment details and pictures of Campbell outside Narcotics Anonymous (NA) constituted a

[218] Ibid. [102-7]
[219] Ibid. [108].
[220] Ibid. [109].
[221] Patrick O'Callaghan, 'Article 8 ECHR as a general personality right? A commentary on Axel Springer AG v Germany [2012] ECHR 277' (2015) 6 JETL, 69.82.
[222] Section 12(4) HRA 1998 indicates the parliamentary willingness to afford free speech particular regard in granting injunctive reliefs; *Reynolds v Times Newspapers* [1999] 4 All ER 609, 629 per Lord Steyn; Theakston v MGN Limited [2002] EWHC 137 (QB) [76-9].
[223] (n 5) [12, 55, 113, 138] respectively per Lord Nicolls, Lord Hoffmann, Lord Hope and Baroness Hale.

disproportionate interference with the claimant's right to privacy because, on one hand, such publication added nothing of substance whilst on the other hand, the impact of such publication was sufficiently considerable because it could deter her from receiving the appropriate treatment. [224] Previous denials issued by the claimant about her drug consumption allowed for the legitimate publication of the basic fact that she was receiving treatment for such consumption; such interference was adjudicated to be proportionate since it prevented the public from being misled. [225]

The new approach of parallel analysis applied in the ultimate balancing test (proportionality test) between those rights inherent in Articles 8 and 10 ECHR was reaffirmed and clarified within the following four key principles laid out by Lord Steyn in *Re S (A child)*. [226] English courts apply, consistently with the overall conventional principles underpinning the Strasbourg Court's jurisprudence, such methodology in the balancing process to decide which right among privacy and freedom of expression should prevail. In other words, the decisive factor in assessing the strength of claims of privacy or freedom of expression is whether the public interest could be served by the disclosure of private information or by the concealing of such information. [227]

[224] Ibid. [144-158].
[225] Ibid.
[226] (n 5) [17] Lord Steyn states: 'The interplay between articles 8 and 10 has been illuminated by the opinions in the House of Lords in Campbell v MGN Ltd [2004] 2 WLR 1232. For present purposes, the decision of the House on the facts of Campbell and the differences between the majority and the minority are not material. What does, however, emerge clearly from the opinions are four propositions. First, neither article has as such precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience, I will call this the ultimate balancing test'.
[227] *McKennitt* (n 12) [54]; *Mosley* (n 33) [104]; *Weller v Associated Newspapers Limited* [2014] EWHC 1163 (QB) [50-2].

2. 4: Concluding remarks

This Chapter has provided an overview of the law around defamation and privacy, setting out the basic structures, tests, and minimal requirements of the traditional pleadings within defamation and MOPI causes of action. It has briefly elaborated on the main structure of defamation to explain the development, definition, and purpose of defamation. It has also considered the main elements of defamatory meaning, reference and publication that the claimant must prove for libellous action to proceed. The chapter has sought to shed light on the current legal presumptions of falsity, malice and reputational damage that assume paramount importance in the debate conducted within subsequent chapters. In addition, the chapter has explored the development, structure of privacy protection in English law under the cause of action in MOPI. It has highlighted the main definitions of privacy within the literature, the differences between informational privacy (MOPI) and physical privacy, the reasonable expectation of privacy test, and the proportionality test. To conclude, this chapter has confirmed the scope of the overlap between defamation and MOPI, concluding that both the slander and physical privacy are excluded from the scope of this study because there are no common factors between them to raise the overlap. The verbal utterance of defamatory and private information is actionable in defamation law, but it is still not actionable under MOPI action. Consequently, it may be concluded that only libel and informational privacy may trigger an overlap since such types involve unauthorised dissemination of defamatory and private information. Accordingly, the elaboration of libel and informational privacy made in this chapter provides a crucial background to facilitate the task of the next chapter which focuses on mapping the overlap between defamation and privacy.

Chapter 3: Mapping the overlap and theoretical framework

3. 1. Introduction

This chapter maps the conceptual and substantive overlap between defamation and privacy. This is achieved, in the first part of the chapter, via the exploration of the relationship between private life and reputation, as protected interests in defamation and privacy. Firstly, this study examines the theoretical accounts explaining the relationship between private life and reputation; and how both interests conceptually interact. In this regard, the jurisprudence of the European Court of Human Rights (ECtHR) may provide an essential ground to elucidate the relationship between the concepts of reputation and private life. Following this, the author attempts to conceptualise the overlap between defamation and privacy in the English jurisdiction by providing a clarification of the conceptual and materialistic overlap between the torts of defamation and privacy. Having identified and conceptualised the overlap on which this study is grounded, this chapter proceeds to provide the theoretical framework against which the research questions of this thesis are tested. The objective of this section is to briefly explore the accounts of the coherence of law, efficiency, feminist analysis, access to justice, the rule of election and distributive justice. In so doing, the chapter introduces the theoretical foundations on which this dissertation is based.

3. 2: The overlap between defamation and privacy

As explained above, this section aims to map the overlap between defamation and privacy. Such overlap is not simply caused by a single set of facts which may give rise the actions of defamation and privacy, but it is a matter of conceptual overlap between the protected interests of such torts. The plan of this section starts with elaborating the

relationship between the privacy and reputation from the theoretical and practical perspectives before elucidating the overlap in the English law.

A- The theoretical/conceptual foundations of the relationship between the interests of reputation and privacy

The literature of the tort law offers three correlated accounts to conceptualise the interacting relationship between private life and reputation. Robert Post, who observes the link between reputation/dignity, offers the first account. David Howarth suggests an alternative account of the reputation as sociality which may consequently undermine the interest of private life if the social ties were broken. [228] Patrick O'Callaghan proposes the third account articulated in terms of the general personality right.[229] These accounts provide conceptual grounds to encompass the reputational harms within the scope of private life. This conceptualisation is crucial to understand and elucidate the development of English torts of defamation and privacy.

Dignity account

Dignity, in the British legal context, constitutes one of the fundamental values underpinning the social order besides the democracy and the rule of law. [230] On such basis, Dieter Grimm argues that dignity is an absolute value existing within every right; in other words, every right consists of a core principle constituting 'dignity' in the abstract along with a more concrete basic right. [231] Hence, freedom of expression and privacy rights both contain principles of dignity. It follows, then, that in cases of conflict between two dignity-related rights, the principle of proportionality should be applied to adjudge which dignitary core

[228] David Howarth,' Libel: Its Purpose and Reform' (2011) 74 MLR 845; Aplin & Bosland, (n 6) 266.
[229] O'Callaghan, (n 221).
[230] Dieter Grimm, 'Dignity in a legal context: Dignity as an absolute right' in Christopher McCrudden (eds) *Understanding Human dignity* (OUP 2014) 386.
[231] Ibid.

principle more closely matches the needs of the law; such a right will, therefore, enjoy higher weight in the balancing process. [232] The key reasons of classifying privacy as a dignitary tort refer to the fundamental rationale of recognizing the right to privacy because the unauthorized publication of private information represents an affront to human dignity and autonomy. [233]

The dignity account provides a conceptual foundation to interpret the relationship between privacy and reputation. Dignity is one of the justifications to include reputational interest within 'private life' under the law because it constitutes the core principle underpinning the reputation and private life interests. Robert Post offers a convincing empirical account of the inextricable links between reputation and dignity.[234] Post observes that the interdependence between the private and public aspect of the self might be paradoxical; namely, the connection between individual dignity, which is an intrinsically private, becomes conflated with individual reputation, which is an essentially dialogic, social and public issue. Post utilizes those frameworks detailing the interdependence of individual personality and general social perspectives originated by scholars working within the school of classical American sociology, i.e. Charles H. Cooley, George Herbert Mead and Erving Goffman. [235]

In this sociological context, dignity signifies the respect and self-respect arising from full membership within the society; such dignity can only be confirmed through

[232] Ibid. 390.
[233] *Campbell* (n 5) [51]; *Douglas v Hello! Limited & Others* [2007] UKHL 21, [2008] 1 AC 1 [275]; *Mosley* (n 33) [214]; Peter Cane, *The Anatomy of Tort law* (Hart Publishing, 1997) 71-4; Nicole A. Moreham, 'Compensating for Loss of Dignity and Autonomy' in Jason N E Varuhas & N A Moreham (eds) *Remedies for breach of privacy* (Hart Publishing 2018) 134.
[234] Robert C. Post, 'The Social Foundations of Defamation Law: Reputation and the Constitution' (1986) 74 Cal. L. Rev. 692, 707.
[235] Ibid. 708-9.

demonstrations of that respect based within the rules of civility. Rules of civility here entail interactions between the concepts of 'deference' [236] and 'demeanour'.[237] Goffman argues that rules of civility constitute the bindings of society, which restrain both the actor and the recipient; based on these rules, individuals not only confirm the social order, but they also constitute ritually-derived aspects of their own identity. [238] Thus, our own sense of intrinsic self-worth, stored in our private personality, is constantly dependent upon ceremonial observance of civility's rules; furthermore, if any social ceremonial transaction suddenly fractures, a person's dignity is consequently affected since each 'individual must rely on others to complete the picture of him of which he himself is allowed to paint only certain parts'. [239]

Alastair Mullis and Andrew Scott argue that the dignity-account, placed in conjunction with the concept of psychological integrity, could operate as an effective justification to frame protection of reputation within private-life rights. Their psychological integrity account is based upon the paradigm of a 'looking glass self' formulated by the sociologist Charles Cooley. [240] This paradigm suggested that our judgments of self-worth or self-esteem largely depend upon the perceived levels of esteem and respect held by others towards us. On this basis, the rights of Article 8 ECHR would be undermined if the defamatory allegations affect the claimant's capacity to be engaged in the society because the individual's personal dignity and psychological integrity are interconnected and interdependent concepts. [241] This means that

[236] Rules of deference define the conduct by which a person conveys appreciation "to a recipient of this recipient, or of something of which this recipient is taken as a symbol, extension, or agent' See: Ibid. 709.
[237] Rules of demeanour define the conduct by which a person expresses 'to those in his immediate presence that he is a person of certain desirable or undesirable qualities' See: Ibid.
[238] Ibid.709.
[239] Ibid.
[240] Mullis & Scott, (n 22) 41.
[241] Ibid. 40.

reputational harms caused by allegations related to the individual's financial or professional status *should* not undermine the individual private life under Article 8 ECHR because such harms adversely affect the individual's reputation classified as property or quasi-property. [242] However, the exclusion of professional reputation from the scope of private life would be untenable because financial information is highly private information and it may likely attract a considerable degree of privacy. [243]

Sociality account

The second conceptual account that incorporates reputation within the remit of private life rights is the sociality account of reputation proposed by David Howarth. Howarth highlights that a sociality-based account offers a conceptual basis for including the reputational interest within the protective scope of private life under Article 8 ECHR that intends to ensure the development of the individual's personality in her relations with other individuals. [244] The pain of social rejection caused by the breaking of social ties (loss of sociality) constitutes an objective harm to the individual's integrity, especially when such social bonds consist of strong ties. [245]

> 'Assertions that someone is diseased and allegations of violent or sexual crime especially crimes against family members, are examples of accusations likely to produce disgust and revulsion reactions that would constitute a threat even to strong ties.' [246]

The reputational harms, therefore, may entail damage to human abilities regarding the formation and maintenance of social linkages. Such harms consequently have detrimental

[242] Ibid. 40-1.
[243] *Claimants v MGN Ltd* [2015] EWCA Civ 1291 [229].
[244] *Pfeifer v Austria* Application No. 12556/03(ECHR, 2007) at 33; Howarth, (n 228) 858.
[245] Ibid. 858-9.
[246] Ibid. 856.

effects upon not only opportunities to access resources, but also personal well-being. [247] The sociality account provides strong theoretical ground for protecting the integral social bonds within the scope of private life. [248] Horwath links loss of reputation and loss of privacy by saying: 'The loss of reputation brings with it the pain of the threat of social isolation and rejection. Actual social isolation and rejection, in turn, constitute further harm to something fundamental in human life.' [249] It is interesting to indicate that the sociality account concurs with the proposition advanced by Alastair Mullis and Andrew Scott that, given the defamatory allegations effect upon individuals' capacities to engage within society on the grounds that the individual's reputation forms part of her psychological integrity, such effects undermine private life rights contained in Article 8 ECHR.[250]

General personality right account

According to this account, the Article 8 ECHR represents a multifaceted and overlapping right of general personality that, among other things, encompasses privacy, reputation, informational self-determination; and one's own image rights. [251] O'Callaghan's conceptual account of general personality right is grounded within the Basic Law of the Federal Republic of Germany which states that 'everyone has the right to free development of his/her personality, insofar as s/he does not infringe the rights of others or offends the constitutional order or moral law'. [252]

[247] David Howarth, (n 228) 849.
[248] Aplin & Bosland, (n 6) 272.
[249] Ibid. 850.
[250] Mullis & Scott (n 22) 40-1.
[251] O'Callaghan, (n 221) 71; O'Callaghan, (n 8) 302-3.
[252] In Germany, Articles 1 and 2 of the Constitution (Grundgesetz), encompassing human dignity and the 'free development of personality', are the foundational principles of the constitutional order. See Patrick O'Callaghan, Refining Privacy in Tort Law (Springer 2013) 36; O'Callaghan, (n 221) 70.

The right to reputation (honour) in Germany has twofold aspects: firstly, the internal aspect, related to self-esteem and human dignity, representing the core of the right to personality; secondly, the external aspect relating to evaluations which constitute the professional reputation of public figures such as politicians. [253] Based upon this divide, and the principle of inviolability of human dignity constituting personality rights within German Law, tarnishing of an individual represents dignitary harm requiring redress. [254] Conversely, priority would be given to free speech rights when external aspects of reputation are at stake and the subject matter of publication pertains to issues of public interest. An exception to this would be when the speech amounts to abusive criticism resulting in egregious harm to reputation. [255]

It is unquestionable that all these three conceptual accounts of dignity, general personality and sociality may provide convincing grounds to justify the inclusion of reputation within private life. However, such accounts were a subject of criticism from various perspectives. The sociality account also faces the challenge of uncertainty of the scope of social bonds that may undermine an individual's private life because it is uncertain whether social relationship of weaker ties such as work relationships, if broken, may affect one's private life. [256] However, such a criticism may not deny the capacity of sociality rationale to explain how damage to reputation undermining our social bonds such as family and friends may result in a forced isolation which consequently undermines the right of private life.

[253] Ibid. 73-4.
[254] Ibid. 70 &73.
[255] In case of serious reputational harm caused by an abusive criticism, this harm falls under the dignity realm which should be unviolated according to the Basic Law of Germany, see: Ibid. 74.
[256] Aplin & Bosland, (n 6) 272.

Christopher McCrudden argues that the use of the dignity-justification might not necessarily provide a principled and coherent ground for judicial reasonings in the context of human rights because the meaning of dignity is largely context-specific, and it varies across time even within the same jurisdiction. [257] Moreover, dignity as an overarching value might not constitute a solid basis for defining rights; dignity alongside with autonomy and democracy are values indirectly protected through the enforcement of many rights. [258] In addition, the 'looking-glass self' concept upon which Mullis and Scott built their account, however, tends to merge the self-esteem concept that refers to the idea of thinking of oneself as valuable and important, with the self-concept which refers to a person's psychologically unified picture of themselves regardless whether such a unified self is framed as positive or negative. [259] For David Howarth, it is unwise to build reputational harms on the grounds of self-esteem since it is far from clear whether this concept could be recognized as a *good* that may be potentially undermined and consequently deserving of legal protection.[260] Furthermore, it might be, practically speaking, somewhat tendentious to claim that individuals' self-esteem strictly depends on others' evaluations – viewed empirically the average adult's conception of themselves predominates over what others, especially those outside of the trusted kinship circles, think of them. [261] Nonetheless, the dignity account was endorsed by many scholars due to its solid ground emphasizing that defamation and privacy are dignitary torts which may undermine the individual self-esteem. [262] The uncertainty in the

[257] Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19 The European Journal of International Law 655, 724.
[258] David Feldman, 'Human dignity as a legal value: Part 2 (1999) Public Law 61, 76.
[259] Howarth, (n 228) 855.
[260] Ibid.
[261] Ibid. 854.
[262] Cheer, (n 15); Christ D. Hunt, 'From right to wrong: grounding a 'right' to privacy in the 'wrongs' of tort' (2015) Alberta Law Review, 635, 664; Barendt, (n 63); David Rolph, Reputation, Celebrity and Defamation Law, (Ashgate Publishing Limited 2008); McNamara (n 62) 57.

psychological literature in respect of the concept of self-esteem cannot convincingly assume it is valueless. [263] Furthermore, the 'looking glass self' theory should not be entirely dismissed not only because Post's 'looking glass' was built upon a strong sociological ground, but also because there is no robust evidence precluding entirely the possible influence of external evaluations of others upon our internal evaluations. An individual's well-being could be significantly damaged because of the lost opportunities caused by a lack of capacity to form meaningful relationships. [264]

It is unsurprising that an individual's reputational aspect may be said to fall within the scope of private life, since such reputation constitutes part of the individual's personality protected by that very right. Nonetheless, the main challenge around applying general personality rights is how to draw a distinctive line between the internal and external aspects when the aggrieved individual feels both aspects are simultaneously breached. In other words, if reputation and private life are subsumed under the personality right, it is wondered whether every reputational harm may undermine one's private life, and similarly every breach of private life may also cause a harm to reputation. [265] The Strasbourg Court may provide a guideline to this inquiry. [266] The European Court used *seriousness* test to determine when the reputational harms should be included within the remit of private life. [267] In *Petrina v Romania,* Strasbourg Court held that the accusations against the applicant (a politician), that

[263] Aplin & Bosland, (n 6) 271.
[264] Hunt, (n 262).
[265] O'Callaghan (n 221) 77.
[266] The relationship between reputation and privacy in the Strasbourg jurisprudence will be the subject matter of the next subsection.
[267] *Axel Springer* (n 203) at 83.

held him to be an agent of the Securitate,[268] were seriously grave, and capable of meeting the necessary threshold to trigger the rights of article 8 ECHR. [269]

This guideline, however, may not provide a comprehensive explanation of the relationship between reputation and privacy because only the allegations which meet the seriousness level may fall within the remit of private life. Furthermore, it provides no elucidation of whether privacy harms can encompass the harm of reputation. Tanya Aplin and Jason Bosland offer an interesting answer explaining the nature of the relationship between reputation and privacy and how both interests may overlap. Aplin and Bosland argue that reputational harms may engage Article 8 rights if the defamatory imputations are related to one of the private or sensitive information such as sexual, medical, financial and extra-marital affairs. [270] In such a scenario, the interests of reputation and privacy are inextricably interconnected that a set of false, private and defamatory facts may simultaneously bring the actions of defamation and MOPI.

B- The relationship between privacy and reputation in Strasbourg's jurisprudence

The earliest interpretation by the Strasbourg court of reputation as a dimension of the right to privacy within Article 8 ECHR dates back to 2004. There, the applicant (a radio station), brought a case to the Strasbourg Court which argued that the French courts had breached articles 6, 7 and 10 ECHR when ruling against the applicant in defamation proceedings. These

[268] Securitate was the Ceausescu's secret police during the communist regime in Romania.
[269] [2009] ECHR 2252 cited in O'Callaghan, ibid. 76; In *Dorota Kania v. Poland* Application no. 44436/13) [ECHR, 2016] [73], The Court applied the same approach in treating the reputation interest when the Court reiterates that the right to protection of reputation is a right which is protected by Article 8 of the Convention as part of the right to respect for private life…..In order for Article 8 to come into play, however, an attack on a person's reputation must attain a certain level of seriousness and be carried out in a manner causing prejudice to personal enjoyment of the right to respect for private life. The Court takes note that the accusation was serious for Mr A.C. To call somebody a secret collaborator with the communist-era security services carries a negative assessment of his behaviour in the past and is surely an attack on his good name'.
[270] Aplin & Bosland, (n 6) 282.

concerned allegations made by the station about M Junot, a former deputy mayor of Paris, who had supervised the deportation of Jews in 1942. [271] The European Court upheld the French domestic decision, also stating that: 'The Court would observe that the right to protection of one's reputation is, of course, one of the rights guaranteed by Article 8 of the Convention, as one element of the right to respect for private life'. [272] In *Lindon and Others v France*, [273] Mr L. Loucaides strongly reaffirmed this interpretation of the relationship between reputation and private life right.

> 'The right to reputation should always were considered as safeguarded by Article 8 of the Convention, as part and parcel of the right to respect for one's private life'

In *Pfeifer v Austria*, [274] the link between reputation and private life was predicated upon the implications of reputational harm for both the personal identity and the individual's physical and psychological integrity. Each of these constitutes aspects of private life, the right to which is guaranteed by Article 8 ECHR. In this case, the European Court found that the allegations in question, namely that the applicant was part of a hunting society and that the applicant's criticism of P.'s article had driven P. to commit suicide, were defamatory and justified the invocation of Article 8 ECHR rights since:

> The Court considers that a person's reputation, even if that person is criticized in the context of public debate, forms part of his or her personal identity and

[271] *Radio France & Ors v France* (2005) 40 EHRR 706: *Chauvy & Ors v France* (2005) 41 EHRR 29.
[272] *Radio France,* ibid. 25.
[273] (2008) 46 EHRR 35, [2007] ECHR 836
[274] (2007) Application No. 12556/03.

psychological integrity and therefore also falls within the scope of his or her "private life"' [275]

Despite Mr. Loucaides's disagreement with the finding of defamation concerning the allegations in question, his justice thoroughly supported the interpretation of the scope of private life to include an individual's reputational interest. The court, however, did not provide further explanations regarding the link between reputational harms and dignity, as well as between dignity and those rights to personal identity, physical and psychological integrity, which constitute 'private life'. [276] This stemmed, perhaps, from the judicial willingness to treat reputation as a direct and automatic aspect of a person's private life, ergo there being no need to identify the link between these two notions. [277] Nonetheless, in subsequent cases, the Strasbourg Court denied any automatic inclusion of reputation within the protective ambit of Article 8 ECHR when it introduced and upheld a new threshold of the seriousness of reputational harm in order to engage the right of private life. This threshold was firstly applied in *A v. Norway ,*[278] there, the European Court ruled that the reputational harm must be serious and cause damage to the individual enjoyment of the right to private life, namely it must be sufficiently grave for it to legitimately fall within the ambit of private life. The Court upheld the application and found that the publication's identification of the applicant as a murder suspect was seriously harmful to the applicant's reputation and 'entailed a particularly grievous prejudice to the applicant's honour and reputation that was especially harmful to his moral and psychological integrity and to his private life'. [279] Furthermore, the court found the national court failed to accord a proportionate or proper

[275] Ibid.
[276] Aplin & Bosland, (n 6) 275
[277] Iibd. 275-6.
[278] Application no. 28070/06 (ECHR 2009).
[279] Ibid. [73].

weight to the applicant's Article 8 ECHR. [280] In *Karako v. Hungary*, the European Court offered clear guidance on the relationship between reputation and privacy since the Court identified how reputational harms could fall within the protective scope of private life rights. [281] The Court distinguished in this case between personal integrity falling within the ambit of private life and the notion of external evaluation falling within the individual's reputation as it related to financial interests and social status. Thus, reputational harms which only affect the external evaluations of the individual, namely her esteem as upheld by society, and do not undermine the individual's personal integrity are thereby excluded from the protective scope of private life. [282] The Court also reiterated that the serious nature of the allegations in question constituted the decisive factor when determining whether the individual's personal integrity was indeed undermined for the purposes of engaging Article 8 ECHR. [283]

Reputation claims may fall within the framework of Article 8 ECHR if the statements complained of were seriously offensive that damage an individual's personal integrity, whereas reputational claims related primarily to financial interests or social status fall within the framework of Article 10 ECHR. [284] However, in a practical sense, nothing in Karako's decision explains how serious allegations could affect personal integrity in a manner justifying the inclusion of reputation within the ambit of private life. [285] It is on these grounds that Judge Jociene articulated his view that the question of that relationship between reputation and private life had not been clearly answered within the Strasbourg Jurisprudence. Jociene thus

[280] Ibid. at 74-5.
[281] (n 258) at 22.
[282] Ibid. at 23.
[283] Ibid.
[284] Brid Jordan, 'Reputation and Article 8: Karako v Hungary' Case Comment (2010) Entertainment Law Review.
[285] Aplin & Bosland, (n 6) 278.

asserted that this matter should be the subject of careful future consideration and ought to be left open for the time being. [286]

The Grand Chamber had the opportunity to clarify its jurisprudence regarding the relationship between reputation and private life notion in *Axel Springer AG v. Germany.* [287] The applicant, in this case, was '*Der Bild*, one of Germany's leading newspapers, in respect of two articles published about the star of the well-known police television series who was arrested and then convicted of possessing a small quantity of drugs (cocaine). The domestic Courts granted the actor a permanent injunction prohibiting the applicant from engaging in any further publications upon the ground that such publication constituted a serious and unjustified interference with the actor's right of personality. The Court upheld the application and considered the interference with the applicant's freedom of expression as unjustifiable within a democratic society; consequently, the applicant's article 10 ECHR was held to be unjustifiably violated. [288] The Court reaffirmed the seriousness threshold applied in *A v. Norway* to accommodate reputation within the ambit of private life as protected under Article 8 ECHR.

Whilst adopting the expanded definition of the private life concept, [289] the court also added a new qualification to explicitly exclude those reputational harms foreseeably resulting from the applicant's own actions: 'The Court held, moreover, that Article 8 cannot be relied on in order to complain of a loss of reputation which is the foreseeable consequence of one's

[286] Karako v. Hungary, ibid. Opinion of Judge Jociene [7].
[287] (n 5) [18-23].
[288] Ibid. at 110-111.
[289] The concept of "private life" is a broad term not susceptible to the exhaustive definition, which covers the physical and psychological integrity of a person and can, therefore, embrace multiple aspects of a person's identity, such as gender identification and sexual orientation, name or elements relating to a person's right to their image. It covers personal information that individuals can legitimately expect should not be published without their consent. Ibid. at 83.

own actions such as, for example, the commission of a criminal offence'. [290] Additionally, the European Court's recent decision in *Magyar Jeti Zrt v. Hungary* added a new qualification codifying reputation within the remit of private life. [291] Professional reputation had hitherto been excluded from the ambit of private life, despite the clear potential seriousness of reputational harms, since it was foreseeable and legitimate that public figures such as politicians would receive further criticism and close scrutiny than private individuals.

Overall, despite the blurred boundaries between the notions of reputation and private life, the European Court adopted a progressive approach to accommodating reputation interest within this area. Their ruling accommodated reputational interests within the protective scope of private life where reputational harms measurably affect the enjoyment of the right to this private life. As previously elucidated, detrimental impacts upon the individual's personal identity and her physical and psychological integrity caused by reputation harms also clearly come under the same category of violations against 'private life'.

C- The overlap between defamation and privacy in the English law

Based on the inextricably conceptual relationship between the reputation and private life, such overlapped interests could be alternatively, but indirectly, protected under both libel and MOPI cause of action. Defamation law was developed to protect against those imputations related to personal attributes that are not only grounded in reputational injuries but also in transgressing the claimant's privacy. [292] False privacy, or false private information,

[290] Ibid.
[291] Application no. 11257/16 (ECHR, December 2018) at 81.
[292] *Thornton v Telegraph Media Group* Ltd (No 2) [2010] EWHC 1414 (QB); [2010] EMLR 25 [33]; Eric Descheemaeker, (n 97).

brings the overlap between defamation and privacy from merely a conceptually unavoidable interaction to a problematic materialistic overlap. This section goes on to explain how both torts materially overlap within the English jurisdiction. The role of defamation law in protecting the individual's privacy and the role of privacy law to protect the individual's reputation is consecutively examined. The final sub-section examines the area of false privacy that constitutes this dissertation's main research topic.

The protection of privacy under defamation law

In order to determine the meaning of imputations, defamation law developed three tests. An imputation is deemed defamatory if: the words tend to lower the plaintiff in the estimation of right-thinking members of society generally, [293] the imputation exposes the claimant to hatred, ridicule, or contempt because of some moral discredit, [294] or it is liable to make the claimant shunned and avoided. [295] The claimant is thus entitled to protect her tarnished reputation once the (presumably false) published statement corresponds to one of the above criteria by bringing defamation proceedings. [296] However, it is arguable that the foundational principle underpinning the tests for ridicule and avoidance respectively is the claimant's privacy or dignity rather than their reputation. [297]

Publications exposing individuals to ridicule are defamatory since they diminish their sense of self. [298] Arguably, the harm caused by such publications constitutes a dignitary injury,

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[293] *Sim v Stretch* [1936] 2 All E.R. 1237, 1240
[294] *Parmiter v Coupland* (1840), 151 E.R. 340, 341-342.
[295] *Youssoupoff v Metro-Goldwyn-Mayer Pictures Ltd* (1934), 50 T.L.R. 581, 58
[296] Andrew Scott, 'Reform of Defamation Law in Northern Ireland: Recommendations to the Department of Finance' (2016) LSE Research Online http://eprints.lse.ac.uk/67385/1/Scott_Reform%20of%20defamation%20law_2016.pdf accessed 30 January 2019.
[297] Descheemaeker, (n 97).
[298] David Rolph, *Reputation, Celebrity and Defamation Law*, (Ashgate Publishing Limited 2008) 156.

or injury to the individual's self-esteem, and thus undermine privacy rather than reputation. Extending this line to its logical conclusion it would arguably be inappropriate to use the defamation law, traditionally designed to protect reputational interest, when protecting and vindicating the right to privacy. [299] By applying the same procedure to *the test of shunning and avoiding*, a similar outcome could be derived from it. In such a scenario, the individual subject to imputations of insanity and shameful diseases does not bear the burden of moral responsibility and thus such imputations, in fact, violate the applicant's privacy instead of her reputation. [300] The absence of direct protection to the right to privacy within English law- prior to the landmark case of Campbell- has been used to justify the figurative inclusion of non-reputational considerations (privacy) into the realm of defamation. [301] Furthermore, protecting privacy under defamation law could result in unjust consequences for the claimant and would be significantly inconsistent with that principle of the right of privacy because in the course of the exercising truth defence, the individual's private information is rendered publicly accessible since truth constitutes a complete defence in defamation. [302]

Tugendhat J recognised the occasional protection of privacy within the realm of defamation in *Thornton v Telegraph Media Group* Ltd. [303] There, his justice recognised that (personal) defamation triggered by imputations to individuals of personal, involuntary attributes which in themselves attract no moral discredit (such as shameful diseases) 'are now

[299] Ibid. 156; Descheemaeker, Ibid.
[300] Descheemaeker, (n 97).
[301] In *LNS,* (n 28) Tugendhat J used this justification to explain the overlap between defamation and privacy actions 'There is a second group of cases where there is an overlap, but where it is unlikely that it could be said that protection of reputation is the nub of the claim. These are cases where the information would in the past were said to be defamatory even though it related to matters which were involuntary e.g. disease. There was always a difficulty in fitting such cases into defamation, but it was done because of the absence of any alternative cause of action'; Descheemaeker, Ibid.
[302] Descheemaeker, ibid.
[303] *Thornton* (n 63).

likely to be brought under the misuse of private information, although that will not necessarily or always be the case'. [304] Nevertheless, his justice did not deny the reputational harms caused by personal defamation since such statements invariably affect 'in an adverse manner the attitude of other people towards [the applicant]'. [305] This case indicates, alongside with Strasbourg's jurisprudential attitude, the conceptual and material interaction (overlap) between reputation and privacy, that protect the latter within the former proceedings, and opens also, as we explain below, the door to protect reputational harm within privacy law in English jurisdiction.

The protection of reputation under privacy law

As explained previously, MOPI may be utilized as a means of protecting the individual's reputation, in addition to what is commonly understood as privacy, precisely because reputational harms can be included within the scope of privacy's realm. The first judicial recognition of reputational harms within a privacy case occurred in *Hannon v NGN* [306] when Mann J refused the defendant's argument that defamation law should only protect damage to reputation. The judge refused to draw a hard line between the realm of privacy and reputation on the grounds that there would almost certainly be some reputational harms caused by a clear invasion of privacy, whilst such reputational harms cannot be adequately protected under defamation law due to the availability of truth as a complete defence. [307] Mann J used the example of a publication revealing medical records, the nature of which caused embarrassment to the applicant, where no dimension of public interest lay within such disclosure. Such publication, in respect of details the claimant had reasonably to be kept

[304] Ibid. [35].
[305] Ibid. [29 & 35}.
[306] [2014] EWHC 1580 (Ch)
[307] Ibid. [29].

private, constitutes a clear invasion of privacy and causes damage to the individual's reputation. [308]

It would be instructive to consider here Tugendhat J's distinction between personal and business defamation. Personal defamation caused by imputations of specific personal and involuntary attribute attracting no moral discredit, such as shameful disease, is likely to be brought under privacy law (MOPI) on the grounds that the domain of health information falls primarily within the right to privacy. [309] Both Tugendhat J and Mann J thus utilize the same example but approach it from parallax points. Tugendhat J focused on the defamation of the person caused by the publication of medical records whereas Mann J focused upon the breach of privacy caused by such publication. It is clear to say that such publication could simultaneously cause damage to the individual's privacy and reputation interests. Based on this reasoning, Mann J's conclusion that reputational harms could be caused by privacy invasion is logically sound because empirically verifiable damage to reputation could be caused by publishing personal information (medical information). Eric Barendt displayed scepticism about the authoritative ruling of *Hannon v NGN* regarding the capacity of privacy law to protect reputational harms because Mann J's decision was made regarding the defendant's application to strike out the actions at a preliminary stage rather than a full trial.[310] Nonetheless, this argument may not substantively challenge Mann J's overarching conclusion that damage to reputation could be one of the elements subsumed under damages awarded in privacy law, and hence that the claimant should be free to instigate

[308] Ibid.
[309] *Thornton* (n 35) [29].
[310] Eric Barendt,' An overlap of defamation and privacy?' (2015) 7 Journal of Media Law, 85, 86; it is well interesting to indicate that this claim has been settled outside the court after the defendant's admission of wrongly breaching the claimants' privacy right under the article 8 rights according to the statement in open court no. HC13A02048 cited in https://inforrm.files.wordpress.com/2015/07/hannon-v-ngn-comm-of-pol-sioc.pdf accessed on 1 March 2019.

defamation proceedings, privacy proceedings, or both actions where an overlap between defamation and privacy exists. [311]

Four years later, in August 2014, Mann J had another opportunity to reinstate his position towards the relationship between privacy and reputation, this time at a full trial. Mann, J found the leading broadcasting channel BBC liable for invasion of Sir Cliff Richard's right to privacy in respect of the defendant's coverage of the raid of police over the claimant's house. [312] Mann J awarded the claimant £210,000 in general damages (£190,000 in compensatory damages, and £20,000 in aggravated damages) relating to the invasion of privacy. [313] The loss of the claimant's reputation constituted one of the factors based upon which damages were assessed; others included distress, damage to dignity, damage to health, and loss of control over the use of private information. [314] Mann J rejected the defendant's argument that reputational harms fall solely within the province of defamation since 'it is therefore quite plain that the protection of reputation is part of the function of the law of privacy as well the function of the law of defamation'. [315] Controversy emerged among scholars in respect of Mann J's stance towards the relationship between privacy and reputation despite such approach is potentially reconcilable with Strasbourg approach. [316] Hence, Paul Wragg argues that conflating reputational concerns with privacy harms in order to remedy the perceived deficiencies in defamation law would result in egregious chilling effects on press freedom because it could be deprived from the protection offered under

[311] Barendt, Ibid. 90.
[312] *Cliff Richard v BBC* [2018] EWHC 1837 (Ch)
[313] Ibid. [358 & 453].
[314] Ibid. [350] A.
[315] Ibid. [345].
[316] See previous subsection.

defences in defamation law. [317] This view, however, may be unjustified because both privacy and reputation are aspects protected under Article 8 ECHR that should be equally treated and valued with the conflicting freedom of expression protected under Article 10 ECHR. [318] Freedom of expression should not have free licence over reputational interest and a reconsideration of the truth defence may be needed in light of Strasbourg's jurisprudence on Article 8 ECHR. [319] Furthermore, Mann J's approach is endorsed by the decision of the Supreme Court in *Khuja v Times Newspapers Ltd*. [320] In this case, the Supreme Court ruled that reputational harms could be subsumed within the harms protected in privacy law because the concept of privacy has a wider capacity to subsume reputational interest. [321]

False privacy (false private information)

In what represented a key development in privacy law, judicial recognition of what is called false privacy exposed potential difficulties relating to the interactions between the defamation and privacy torts. The concept of false privacy refers to claims in which the claimant reveals the falsity of the private information or refuses to comment on its truth or falsity.[322] In the English jurisdiction, it is well established that the dichotomy of truth and falsehood constitutes an irrelevant issue under privacy law. Once the information is formally private, it could be protected under privacy law (MOPI) regardless whether it is true, false or

[317] Thomas Bennett and Paul Wragg, 'Was Richard v BBC correctly decided?' (2018) 23 Communications Law, 151, 155.
[318] Ibid. 160.
[319] See chapter 5.
[320] [2017] UKSC 49.
[321] This matter will be widely discussed in the chapter 7.
[322] Chris Frost, *Journalisms Ethics and Regulation*, (3rd edn, Preason Education Ltd 2011) 103; J John Hartshorne, 'An appropriate remedy for the publication of false private information' (2012) 4 JOML 104; The Press Complaints Commission: Annual review 2005, http://www.pcc.org.uk/assets/111/PCC_Annual_Review2005.pdf> accessed 1 January 2019.

mixed information. [323] In *McKennitt v Ash,* [324] the court decisively included the issue of falsity within the scope of MOPI. In this case, the claimant Loreena McKennitt, a known folk musician from Canada, claimed that the first defendant Niema Ash, the claimant's ex-friend, had published a book containing personal and confidential information. This included details about the claimant's personal and sexual relationships, her personal feelings towards a deceased fiancé, her health, and her diet. The claimant argued that publication of these details constituted a breach to her privacy and confidence, and she sought a declaration to this end along with an injunction and damages. [325] The court's initial ruling found that the claimant had a reasonable expectation to keep this information private and confidential. It thus ordered an injunction to restrict further publications of the same or similar information and awarded the claimant damages for her hurt feelings and distress. [326] The Court of Appeal upheld the initial judgement and dismissed the defendant's appeal. [327] The Court rejected the defendant's argument, namely that privacy claims should not be brought regarding false statements, on the grounds that falsity should fall within the field of defamation law. When determining the scope of MOPI Longmore LJ emphasised that truth or falsity are irrelevant concepts.[328]

The judicial affirmative approach towards false private information was also reaffirmed in *P v. Quigley*. [329] In this case, the defendant, Mark Quigley was permanently restricted from publishing any information related to the claimants' sexual and private conducts, behaviours, thoughts or desires within the defendant's new novel in which the

[323] *McKennitt* (n 12) [86]; *P v Quigley* [2008] EWHE 1051 (QB) [6].
[324] *McKennitt v Ash* [2005] EWHC 3003 (QB).
[325] Ibid. [3].
[326] Ibid. [159] & [162].
[327] Ibid.
[328] *McKennit*t (n 12) [86]; *Ferdinand v MGN Ltd* [2011] EWHC 2454 (QB); *Goodwin,* (n 154) [92].
[329] *P v Quigley* (n 303).

claimant appears disguised. Eady J found that publication of sexual activities, regardless of their truth or falsity, could be harmful and thus constitute an unacceptable infringement of the claimant's rights under Article 8 ECHR. [330] In *Cooper v Turrell,*[331] Tugendhat J also reiterated the same approach and decided that under MOPI the unauthorised publication of private information may breach an individual's privacy, irrespective whether the information was true, false or mixed. In this case, the claimants, a public company and its executive chairman Mr Cooper, successfully sought an injunction, delivery up and damages through three related actions of libel, breach of confidence and MOPI. As far as MOPI was concerned, Tugendhat LJ decided that the claimant, Mr Cooper, was entitled to damages once his privacy rights had been invaded by the unlicensed dissemination of his private information. This violation applied whether the private information could be verified as being completely or partly true or false. [332]

Such an expansive approach to privacy is consistent with the justification of privacy protection seeking to protect the individual dignity, autonomy and control of individuals' private information. [333] Judged within in the context of confidentiality and privacy, it is apparent that falsity should not constitute an obstacle to the protection of information once it is related to personal and private life. Dignitary interests can still be injuriously affected by disseminating false information. [334] The core purpose of privacy rights is to protect the claimant's right to control the disclosure of her private information, namely the ability to

[330] Ibid. [6].
[331] *Cooper v Turrell* [2011] EWHC 3269 (QB)
[332] Ibid. [102].
[333] Tanya Alpin, 'The relationship between breach of confidence and the tort of misuse of private information' (2007) 18 King's Law Journal 329, 333-5.
[334] Tanya Aplin & al., *Gurry on Breach of Confidence: The Protection of Confidential Information (*2nd edn, OUP 2012) para. [5.72]; Roger Toulson & Charles Phipps, *Confidentiality* (2nd edn, Sweet & Maxwell 2006) 87.

decide whether, when and to whom such information ought to be revealed. [335] Such an ability is logically affected by unauthorised disclosures of private information, regardless of whether the disclosed information is true or false. Furthermore, privacy can be breached by disclosing false private information because the truth is technically not a defence in privacy action. The nub of privacy lies within its protection of information's intrinsically private nature; hence, its truth or falsity has no valence within the realm of privacy. [336]

Such a judicially-driven development, however, situated the defamation and privacy torts in conflict with each other since the former operates on the dichotomy of truth and falsity. [337] False, private and defamatory information could be protected not only by defamation law, but also now by privacy (MOPI). Conversely, true information, if private, may be protected by privacy law; but not by defamation law, since there is no legal wrong in telling the truth about an individual. [338] The capacity of privacy law to protect false private information was an expropriating manoeuvre by MOPI, upon the territory of defamation. [339] This thesis, however, endorses this development and argues that the dichotomy of truth/falsity may not prevent the occurrence of the overlap between defamation and privacy torts since their protected interests, reputation and privacy, are conceptually intertwined.

[335] Descheemaeker, (n 97); Hugh Tomlinson QC,' Defamation and False Privacy, some thoughts' (The International Forum for Responsible Media Blog, 14 December 2010) https://inforrm.wordpress.com/2010/12/14/opinion-defamation-and-false-privacy-hugh-tomlinson-qc/ accessed 1st July 2017

[336] *McKennitt* (n 12); Samuel Warren & Louis Brandeis,' The Right to Privacy' (1890) 4 Harvard Law Review 193,218.

[337] Rolph, (n 13) 475.

[338] Ibid.

[339] See next chapter.

3. 3: The theoretical framework

This section explores the theoretical framework based upon which the research questions of this thesis are analysed. It encompasses a variety of perspectives that may enrich the analysis of the overlap and it impact on defences, interim injunction and damages.

A- The quest for Coherence of law

Coherence enjoys a great value because it assumes undeniable importance within all fields of knowledge since coherence entails being intelligible, logical, well interconnected and well expressed; conversely, lack of coherence leads to unintelligibility and disarticulation.[340] Ronald Dworkin argues that the lack of coherence resulting from inconsistency rationales within the legal system, would affect its moral authority or legitimacy. [341] As highlighted by Dworkin, the coherence of the legal system may also lead to the achievement of valuable targets such as equality, legal certainty (predictability) and obeying the law. [342] Coherence depends upon whether the law attains a supportive structure; this includes strong support between statements, connections between supportive chains, reciprocal justification between statements, and conceptual cross-connections. [343] Joseph Raz describes coherence as a systematic or uniform account of mutually supportive and interdependent principles, resulting in a systematic interconnection of all parts. [344] Schiavello concurs with Raz regarding the structural view of coherence; he argues that the concept refers to harmonization between the fundamental principles of the legal system and the judicial decisions. [345] Ken Kress

[340] Joseph Raz, 'The relevance of coherence' (1994) 72 BULR 273, 276.
[341] Ronald Dworkin, Law's Empire (Harvard University Press 1986) 166; John McGarry, 'The possibility and value of coherence' (2013) 34 Liverpool Law Rev. 17, 21.
[342] McGarry, ibid. p. 23-25.
[343] Raimo Siltala, *Law, Truth, and Reason: A Treatise on Legal Argumentation* (springer 2011) 58; Aleksander Peczenik and Robert Alexey, 'The Concept of Coherence and Its Significance for Discursive Rationality' cited in Siltala, 56-57.
[344] Raz, (n 340) 293, 315.
[345] Aldo Schiavello,' On ``Coherence '' and ``Law'': An Analysis of Different Models' [2001] 14 Ratio Juris 233,237

identifies three issues required to determine coherence, comprised of consistency, monism and internal unity. [346] Firstly, consistency means the absence of internal contradiction or logical dissonance between norms and judicial decisions of the legal system. [347] This broadly means that legal rules can be considered coherent when free from contradiction. For example, rules related to one legal system should not impose different outcomes regarding one set of facts. [348] Inconsistencies, in practice, are recommended to achieve coherence in the long run, since gradually solving these inconsistencies is better than forcing consistencies through hoc solutions. [349] Secondly, the concept of monism has three versions of monism: strict, moderate and non-master principle monism. [350] Finally, unity or internal architecture means that the strength of connections between principles conceivably reflects degrees of coherence. Thus, if the abandonment of a principle(s) entails relinquishment of all other principles, this suggests strong internal interdependency and consequently strong coherence.[351]

[346] Ken Kress,' Coherence and Formalism' [1993] 16 H. J. L. & P. P 636,662.
[347] Aldo Schiavello,' Neil McCormick's Second thoughts on legal reasoning and legal theory' [2011] 24 Ratio Juris140, 144.
[348] Ross B. Grantham & Darryn Jensen, 'Coherence in the Age of Statutes' (2016) 42Monash University Law Review 360, 363.
[349] Raz (n 340) .286; Kress, (n 346) 662-663; MacCormick Neil, 'Coherence in Legal Justification' in Aleksander Peczenik et al (eds), *Theory of Legal Science* (Reidel 1984) cited in Aldo Schiavello, (n 345) 236.
[350] Strong monism refers to a theory built on a single fundamental principle from which all subprinciples stem. Moderate monism refers to a theory built upon a small group of principles, reflecting a unified approach or spirit; this group of principles represents and functions within the role of a master principle.
[351] The strict version of unity requires a relationship between all principles or norms of the theory. This means that every principle has a justificatory, evidentiary, inferential relation to all other principles. The moderate version, by contrast, requires the above relation between some principles; a single principle norm is therefore constituted by a mutually supportive, justificatory or explanatory network connected several principles but not all. Monism and unity are strongly associated; strong monism constitutes similarly strong unity, thus resulting in the promotion of legal coherence, whereas the more pluralistic the law is the less coherent it is. See: Raz, ibid. 286; Kress (n 346) 666; Ken Kress, 'Coherence' in Dennis Patterson (eds), A Companion to philosophy of law and legal theory (Blackwell Reference online 1999)

The argument behind excluding protection of false information from the scope of privacy thus rests upon retention of the global coherence of legal system. [352] According to such argument, defamation should be the arena of false information whereas privacy the arena of true information; no overlap could be produced between both torts and consequently, no incoherence in law could manifest. [353] Global coherence focuses on the legal justification underpinning judicial decisions when they cohere with the totality of established law. [354] This view foregrounding the centrality of intersystem coherence is associated with Sartorius and Dworkin. Sartorius commented on the concept of judicial creativity, in which judges become free legislators in complex cases, because the scheme of interpretation underpinning judicial decisions should remain based upon a proper harmony with the whole legal system. [355] Dworkin has a similar view towards the adjudicative integrity; his theory requires judges to consider public standards as a coherent set of principles and implicit norms within their interpretative processes.[356] Dworkin argued for integrity, and by extension coherence, with his work thus reflecting a strong monism. [357]

Local coherence, in contradistinction to global coherence**,** refers to coherence within a specific field or area of law rather than the whole legal system. There are many arguments supporting the primacy of local coherence over the global equivalent. Firstly, there are principles related to special areas of law which are sometimes incoherent with principles

[352] David Rolph, 'Irreconcilable Differences? Interlocutory Injunctions for Defamation and Privacy' (2012) 17 Media and Arts Law Review, 170-200

[353] Ibid.; O'Callaghan, (n 6)

[354] Barbara Baum Levenbook, 'The role of coherence in legal reasoning' (1984) 3 Law and Philosophy 355.

[355] Rolf Sartorius, 'The Justification of the Judicial Decision' (1968) 78 Ethics 171, 179 Sartorius explains that 'Any particular decision will then be justified in terms of its coherence with the system which at any given time achieves a maximum of correspondence in this sense to the total set of relevant existing judicial obligations'

[356]Dworkin, (n 341) 217.

[357] ''It will be useful to divide the claims of integrity into two more practical principles. The first is the principle of integrity in legislation, which asks those who create law by legislation to keep that law coherent in principle. The second is the principle of integrity in adjudication: it asks those responsible for deciding what the law is to see and enforce it as coherent in that way'' Ibid. 176.

attached to other areas of law. By this measure, attaining a global coherence based upon general principles within a decision is implausible, even if this logic results in inconsistency. [358] Secondly, achieving area-specific coherence is a more achievable and feasible task for judges due to human limitations in terms of knowledge and time. [359] Thirdly, global coherence could be considered as a default aim, one which is gradually achievable.

Principles and norms of the relevant field of law should be considered first, if these do not help to support, a decision in hard cases related fields of law should be examined, and then standards pertaining to the whole legal system become the subject of consideration in this case. [360] Furthermore, legal justifications could be reached between three fields of law; this can neither be considered as local nor as global coherence. [361] Finally, global coherence undervalues the degrees and implications of pluralism in principle and practice. Pluralism does not necessarily lead to incoherence; sound principles can be consistently applied within the law resulting consequently in pockets of coherence. [362] For these reasons, such area-specificity potentially maintains the coherence of privacy law as well as that of defamation. Such an approach consisting of what may be termed area-specific coherence is adopted to defend not only the inclusion of false private information within the remit of privacy law, but also the inapplicability of libel defences in privacy law. Beyond this, this thesis examines the question of interim injunction rules as applied in the overlapping cases.

[358] Levenbook, (n 355) 367.
[359] Ibid. 371.
[360] Ibid. 372.
[361] Ibid. 371.
[362] Raz, (n 340) 310.

B- The economic analysis (Efficiency)

Efficiency as a general goal of tort law could be used to frame questions arising from the overlap between defamation and privacy. [363] Economic analysis may thus prove crucial in addressing the main question of this study; that is, whether false private information should be protected by privacy law or should only fall under the purview of defamation law. Economic analysis could provide a solid and convincing basis upon which to decide which law may provide an efficient solution to this question. This framework of efficiency is also applied into the subsequent questions regarding the potential application of defamation defences within privacy cases. Efficiency could also apply when deciding upon the most desirable rules for the application of interim injunctions where defamation and privacy overlap.

There are two interpretations of underpinning 'efficiency' as defined within the legal context. [364] Firstly, an efficient legal rule simply means, according to Pareto, one which induces behaviour to make a person better off, or no one worse off. Secondly, efficiency, according to Richard Posner, means wealth-maximization based upon a cost-benefit analysis; wealth in this context refers to the monetary compensation or equivalent variations for members of society. Efficiency could not only occur through a minimization of the transaction costs but also through maximizing wealth or the 'size of the pie' when two interests interact.[365] We may take an example from nuisance law; a factory located next to living area engages in activities resulting in higher profits and damages to its neighbours. Since increased production entails higher levels of damages, so efficiency subsequently proposes a solution

[363] Keren-Paz, (n 45) 42-4.

[364] Lewis A. Kornhauser, 'Economic Rationality in the Analysis of Legal Rules and Institutions' in Martin P. Golding William A. Edmundson (eds) *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Blackwell Publishing Ltd 2005) 67; Richard A. Posner & Francesco Parisi,' Law and Economics: An Introduction' in Richard A. Posner & Francesco Parisi (eds) *Law and Economics* (EEPL 1997)

[365] A. Mitchell Polinsky,' An introduction to law and economics', (4th edn, WKL&B 2011) 19; Steven Shavell, *Foundations of economic analysis of law* (Cambridge2004).

that maximizes the wealth and minimizes the damages. [366] Calculations should clearly also consider the social value of a risk-creating activity. [367] In other words, the social value which itself partially forms the basis for an actor's very engagement in risk-creating activity ought to be calculated within any assessment of activity benefits compared with costs when evaluating the sum reasonableness of that activity. [368] Therefore, a legitimate (socially valued) and efficient (cost-justified) action is not, from an economic analysis perspective, negligent and wrongful because of its desirability. Nevertheless, such desirability is insensitive to distributive considerations since it would leave a victim (injured party) without remedy.

The economic analysis seeks to induce socially optimal activity where the benefits of increasing activity levels are not outweighed by the social costs caused by such activity. [369] If the social costs of an activity were externalised, the actor's incentives to perform such beneficial activity would be increased up to the point where no benefits are produced. Conversely, social costs are internalized when actors are held liable for injuries caused by increasing their activity. [370] Liability rules, from an economic perspective, could, therefore, result in efficient behaviour stemming from disincentivizing activities whose social benefits are outweighed by their social costs. [371]

In the context of defamation law, such economic analysis suggests that socially optimal publication depends upon liability choice standards; in other words, the incentives of publications significantly depend upon liability systems whose principles are affirmed within

[366] Polinsky, Ibid.
[367] Keren-Paz, (n 45) 88.
[368] Ibid. 89.
[369] Steven Shavell, *economic analysis of law* (2004) 40-1.
[370] Ibid. 43.
[371] Posner & Parisi, (n 364); Thomas Ulen, *Law and Economics* (6th edn Addison-Wesley 2016) 189.

the courts. [372] Under strict liability standards, such incentives would be optimal since the publisher would internalize the potential social costs by ensuring the accuracy of potentially libellous publications. A liability based on fault standards would result in the careless publication of potentially harmful material once publishers meet the relevant standard of care, irrespective of social costs caused by such publications. [373] The social benefits of information depend not only on their subject matter (such as that relating to political issues) but also on their accuracy. True statements are more socially valuable than false information, thus the social benefit of speech increases with the probability of the speech's accuracy. [374] Relaxing the standard of liability, however, could not only increase the publications incentives, and consequently the probability of true information in the market, but also increase the social cost of false speech. This may undermine the social benefits of true speech in the long term.[375] Furthermore, the over-publication of false information could also undermine public trust in the media and make defunct their societal watchdog role; a decreased trust in media's ability to report accurately consequently decreases its incentive to track public figures' wrongdoings.[376]

Based on such analysis, defamation law ought to increase incentives for socially efficient behaviour on the part of publications for the sake of upholding that watchdog function of media upon which a democratic society is, at least in part, predicated. Economic

[372] Acheson & Wohlschlegel, (n 111) 349.
[373] The standard of liability in defamation law in US has been shifted to the 'actual malice' fault standard according to Supreme Court decision in New York Times Co. v. Sullivan in regard libel claims brought by public figures. The development in English law in Reynolds v. Times Newspapers Ltd and the statutory defence of publication on matter pf public interest shifted the standard of liability in defamation law to fault-based liability. In the US. Jurisdiction, however, the claimant has to prove the defendant' fault that she knows the falsity of the statement or was reckless in not investigating its truthfulness. See Ibid 345.
[374]Ibid. 352.
[375]Ibid. 381.
[376] Irini Katsirea 'Fake news: reconsidering the value of the untruthful expression in the face of regulatory uncertainty' (2018) 10 Journal of Media Law, 159, 170.

analysis of informational privacy suggests that the concealment of private information potentially reduces a specific market's efficiency if such concealment suppresses awareness of undesirable deficiencies; conversely, the flow of such information may promote the efficiency of that market.

Posner argues that protecting private information might lead to market inefficiencies since the social costs of such concealments outweigh their benefits. [377] To take an example from personal life, one major social cost of concealing personal deficiencies between prospective spouses would be the length of courtship between them; this social cost may consequently lead to an undesirable inefficiency in the market of marriage. [378] Such undesirable inefficiencies could be perpetuated if the seller conceals deficiencies of products and increases the social costs of such marketplace fraud. However, to induce efficient flows of useful information within the market, an economic analysis of informational privacy differentiates between true and false private information. Flows of true private information may constitute an efficient solution, should the social incentive of private information availability outweigh the individual interest in concealing it. [379] The opposite applies in the event of such private information proving false: an individual's interest in keeping such information concealed here would presumably exceed the social benefits of releasing such information to the market.

C- Feminist analysis

As feminist studies in this field have elucidated, tort law was historically premised upon male norms to the consequent detriment of women as subjects entitled to equal

[377] Richard A. Posner, 'The Economics of Privacy' [1981] 71 the American Economic Review 405, 406.
[378] Ibid. 406.
[379] Raymond Wacks, *Personal Information: Privacy and the Law* (OUP 1993) 28-29

protection under the law. [380] The ostensibly neutral mechanisms offered by tort law to protect individuals' rights might imply a gender bias since such existing arrangements treat male harms as de facto worthier of protection. In this regard, feminist analysis changed its view dramatically on privacy law from a protective means of dominant positions that men possess in society to an effective means, as this thesis argues, to protect the vulnerable positions of women in society. [381] A feminist approach permits a challenge to such biases and aims to redistribute burden and benefits for the sake of men and women alike; it is therefore particularly attentive to areas related to sexual harms where women suffer disproportionally in comparison with men. [382] A feminist approach militates against the sexual double standards constitute one of society's culturally and socially ossified prejudices when women, in comparison with men, face inordinately negative judgement around their conduct relating to matters of sexuality. [383] This standard refers to those socially biased criteria by which consequences of sexual conducts are assessed and in respect of which women are consequently socially disadvantaged in relation to their male peers. [384] Such discriminatory standards provide a powerful impetus for feminist scholars to examine those legal rules, such as privacy and defamation, protecting individuals from the harmful disclosure of sexual information in order to make legal protection more effective in respect of biased standards.[385]

[380] Janice Richardson & Erika Rackley, 'Introduction' in Janice Richardson and Erika Rackley (eds) *Feminist Perspectives on Tort Law* (Routledge 2012) 1.
[381] Paul Bernal, *Internet privacy rights: rights to protect autonomy* (CUP 2014) 47.
[382] Ibid. 2.
[383] Paula England & Jonathan Bearak,' The sexual double standard and gender differences in attitudes toward casual sex among U.S. university students' [2014] 30 Demographic Research, 1327.
[384] Gabriela Sagebin Bordini & Tania Mara Sperb,'Sexual Double Standard: A Review of the Literature between 2001 and 2010' (2013) 17 Sexuality & Culture 686, 687.
[385] Janice Richardson, 'If I cannot have her everybody can: Sexual disclosure and privacy law' in Richardson and Rackley (n 200) 145; Janice Richardson,' The Changing Meaning of Privacy, Identity and Contemporary Feminist Philosophy' [2011] 21 Minds & Machines 517,521.

The relevance of feminist analysis to the questions arising out of the overlap between defamation and privacy stem from the fact that each tort may be specifically raised in respect of sexual disclosures concerning women. For example, in *Mosley v MGN*, the unauthorised publications made by the media related to sadomasochistic activities with five dominatrices in the claimant's private flat. [386] In *Terry v Persons Unknowns*, the applicant unsuccessfully sought a super injunction preventing any publication relating to his adulterous relationship with Vanessa Perroncel; the latter sent a letter to the court in order to strengthen the injunctive application. [387] Following the judicial rejection of their respective privacy rights-based arguments, wild media coverage ensued. Perroncel expressed her sadness during an interview regarding this outcome. [388]

D- Access to justice

Patrick O'Callaghan argues that privacy law must enjoy a 'breathing space' when considering false private information published in conjunction with true private information. If privacy protection was only concerned with the publication of completely true private information, it would preclude many victims from accessing justice. [389] However, access to justice potentially not only entails legal protection of rights but also the promotion of access to courts and other legal services in the first instance for those seeking adjudicative reliefs.[390] The fact that both actions of defamation and privacy are extremely expensive and leave even powerful litigants out of pocket potentially undermines O'Callaghan's argument that

[386] *Mosley* (n 33) [2-4].
[387] *LNS* (n 28) [29].
[388] Perroncel explained: 'It is like a nightmare. Every day you think: 'What else are they going to say about me?' It is so intrusive and so false. Every day, so many lies – and then people making judgments because of the lies'. Roy Greenslade, 'Two newspapers apologise to Vanessa Perroncel for breaching her privacy' The Guardian (London, 7 October 2010)
[389] O'Callaghan, (n 8) 286.
[390] Hazel Genn,' Understanding Civil Justice' [1997] 50 CLP 155, 176.

enlarging privacy law to cover a mixture of true and false information could in of itself increase access to justice.

Defamation and privacy actions are significantly expensive; consequently, it is relatively hard for people of limited incomes to access means of judicially protecting their rights or to prevent such breaches. Libel cases have traditionally been classified as a 'rich man's tort' due to the unaffordable costs of litigation. [391] For example, after a failed libel case Richard Desmond, had to pay a bill of £1.25 million. [392] Elsewhere, in *Jones v Associated Newspapers Ltd*, [393] even though the claimant of a successful libel action, Martyn Jones MP, was awarded a modest sum of damages of £5,000; but the defendant faced a bill of legal costs totalling £520,000. England and Wales were classified as an extremely expensive places to bring libellous litigations compared with 12 European countries. [394] Such costs deter many defamed victims, facing well-resourced media opponents, from suing these powerful organisations due to the potentially high expenses combined with the risk of litigation. [395]

Litigants in privacy cases face also a similar challenge in respect of the legal costs. Many claimants, especially those of limited means as well as media organisations, are significantly deterred from bringing legal proceedings around privacy, or conversely from defending themselves against such proceedings, due to the highly expensive costs. [396] In the leading case of privacy, *Mosley v MGN,* even the successful outcome for the claimant ended up with him out of pocket. Mosley spent £510,000 on legal fees but was left with a net bill of

[391] Culture, Media and Sport Committee - Second Report: *Press standards, privacy and libel* (session 2009) para. 235.
[392] Ibid. para. 236.
[393] [2007] EWHC 1489 (QB) cited in ibid. 237.
[394] Culture, Media and Sport Committee - Second Report, (n 393) para. 248.
[395] Ibid. para. 239.
[396] Joint Committee on Privacy and Injunctions - First Report: *Privacy and Injunctions*, (2012) Costs and access to justice 138.

£30,000 after receiving £420,000 from the defendant as taxed costs and £60,000 as damages.[397] The average privacy case at full trial may cost more than £270000, whereas the minimum cost of obtaining an interim injunction ranges between £15,000 to £25,000. [398] In this instance, the nature of privacy cases and the increasing amounts of information required, whether from the claimant or defendant, significantly contribute to these sizable litigation fees. [399] The expense and complications attached to seeking justice, either through redress or mounting a defence, within the civil justice system may be reasonably considered as constituting a significant barrier for the disadvantaged and creating opportunities for the wrongdoers to escape legal liability. [400]

In order to overcome this obstacle by increasing the accessibility of courts, and enabling powerless litigants to protect their rights, legal aids were introduced. [401] The legal aid was established within English law since 1949, providing financial support relating to cases brought within both criminal and civil justice systems that would otherwise result in gradually heavier expenses. [402] Nevertheless, this increase of legal aid expenditures was the subject of political debate. These debates led to the subsequent passing of the Access to Justice Act of 1999, [403] and, more recently the Legal Aid, Sentencing and Punishment Offenders Act 2012. The result, in this case, was a shrinking of budgets allocated for assisting with civil complaint suits and the abolition of legal aid for most civil cases.[404] Nevertheless, many alternatives

[397] Culture, Media and Sport Committee, (n 394) 238.
[398] Joint Committee on Privacy and Injunctions, (n 396) 137.
[399] Ibid, 135.
[400] Genn, (n 390) 166.
[401] Hazel Genn,' What Is Civil Justice For? Reform, ADR, and Access to Justice' [2012] 24 Yale Journal of Law & the Humanities 397, 399.
[402] Legal Aid and Advice Act 1949
[403] It has been said that there is misleading in calling this act as Access to Justice because legal aid of civil cases has been effectively swept away. Genn, ibid. 403.
[404] Genn, (n 390) 39.

were created to help disadvantaged litigants to get access to justice; these include conditional fee agreement and damages-based agreement.

E- The rule of election

The overlap between defamation and privacy axiomatically raises a question concerning the potential accumulation of the monetary awards of defamation and privacy actions, if the claimant gained both. Compensatory damages, gain-based damages and exemplary damages are the three types of financial remedies that could be awarded to recompense the harms in defamation and privacy law. [405] English law has a settled rule that compensatory and gain-based damages are alternative remedies; that is, no accumulation of such damages is permissible should both remedies arise in respect of the same wrongful act, and the claimant is therefore required in such circumstances to make an *election* between them. [406] Lord Nicholls of Birkenhead in *Tang Man Sit v Capacious Investments,* [407] asserted that financial remedies may be divided into two categories: they are either alternative or cumulative remedies. Alternative and inconsistent remedies cannot be awarded together to redress the harm caused by a single wrong; thus, the claimant needs to elect one of the alternative remedies, either gain-based *or* compensatory damages, even though he may be able to claim both remedies. Contrary to the settled notion of alternative remedies, cumulative remedies may be both awarded without a need of election; however, there is a limitation around cumulative remedies that proscribes any double recovery for one loss. [408] Compensatory and gain-based damages, however, raised in respect of different wrongful

[405] James Edelman, *Gain-Based Damages: Contract, Tort, Equity and Intellectual Property*, (Hart Publishing 2002) 246.
[406] Joshua Marshal & William Lister, 'Compensatory damages and account of profit: separate elections for separate causes of action trade mark infringement and passing off' (2016) 11 J. O. I. P. L & P. 285, 291.
[407] [1996] AC 514, 521.
[408] Ibid. 522.

acts, are non-alternative but cumulative; no election, therefore, is required in such a situation.[409]

F- Distributive Justice

Distributive justice is a mechanism that seeks to achieve a fair distribution of burdens and benefits among the members of society. [410] It is based upon geometric norms and seeks to proportionally allocate goods among members of society. [411] This distribution is grounded within Aristotelian notions of utilizing mathematical proportions to justly determine distribution outcomes. [412] Distributive justice, therefore, depends on three generic issues: to whom is justice owed, what are matters of distribution, and the patterns of distribution. [413] This study is concerned with adopting a progressive approach to tort law in order to redistribute the benefits and burdens between the advantaged and disadvantaged members in society. In order to examine the reasonableness of a given activity, the distributive justice offers crucial insights via the factors of fairness and loss spreading. The behaviour/activity could be categorised as reasonable if it would achieve a fair distribution of benefits and costs among the participants.

[409] Edelman (n 405) 246.
[410] Keren Paz, (n 45) 5; Jeremy Waldron, 'The Primacy of Justice' [2003] 9 CUP 269,278; Dennis McKerlie,' Aristotle's Theory of Justice' [2001] The Southern Journal of Philosophy, 119.
[411] Benjamin C. Zipursky, 'Philosophy of Tort Law' in Martin P. Golding and William A. Edmundson (eds) *Philosophy of Law and Legal Theory* (Blackwell Publishing Ltd 2005) 133.
[412] Aristotle, The Nicomachean Ethics (Oxford U P 1998) 113 cited in Michael Da Silva 'Formalising formalism: Weinrib, Aristotle, and the nature of private law' (2018) 9 Jurisprudence, 486, 492.
[413] John Rawls, *A theory of justice* (Cambridge 1971); Keren-Paz, (n 45) 7; Peter Vallentyne, distributive justice in Robert E. Goodin, Philip Pettit & Thomas Pogge (eds) *A Companion to contemporary political philiosophy* (2nd edn, Blackwell Publishing 2012) 550-1; Nancy Fraser, J*ustice Interruptus: Critical Reflections on the Postsocialist Condition* (New York 1996) 13.

Fairness

The fairness imposes, as Gregory C. Keating argues, that the participants, who stand to benefit from a given activity, should equally bear its potential costs and risks. [414] Fairness requires the relocation or rearrangement of the burdens relating to advantageous activities onto those who reap the benefits of such activities for several reasons. [415] Firstly, it is inequitable for actors to reap the advantages of valuable activities and leave their burdens to be borne by strangers unrelated to that activity. Secondly, it is also categorically unjust to divide participants into burden-enduring participants and benefits-enjoying participants. Finally, it is unfair to concentrate the costs of a mutually valuable activity onto a specific handful of participants while the advantages of such activity are publicly shared and widely spread. Fairness, therefore, demands a reciprocity between enjoying the benefits and bearing the costs of a given activity. [416] Using this logic, that under a fairness rationale it would be deemed outrageously unfair to require those victims who gain no benefits from a specific activity to bear its burdens (costs). [417] The potential application of the defamation defence of publication on matter of public interest may require scrutinization of the benefits and the costs relating to the publication of private and defamatory information in order to determine whether the defendant's belief was reasonable.

Loss spreading

The idea of loss spreading, as a goal of tort law, focuses on reducing the impact of accident losses on bearers rather than simply reducing the size of the losses themselves. [418]

[414] Gregory C. Keating, 'Distributive and Corrective Justice in the Tort Law of Accidents' (2000) 74 CAL. LAW REV. 193, 195; Keren-Paz, (n 45) 90.
[415] Keating, Ibid. 196.
[416] Tsachi Keren-Paz, Sex Trafficking: A Private Law Response (Routledge 2013) 109.
[417] Ibid. 110.
[418] Guido Calabresi, *The costs of accidents* (New Haven 1970) 26-7 cited in Keren-Paz, (n 45) 89.

Imposing liabilities upon a defendant adequately capable to bear and pay damages to the harmed party and thereby spreading such damages on other bearers was considered as the goal of compensation and loss spreading. A prime example of this includes the bearing of losses, through revenue-collection, by taxpayers in the case of damages being paid by a governmental agent following a tortious claim. [419] Tsachi Keren-Paz argues that the loss-spreading mechanism, from an egalitarian perspective, might be a preferable criterion to assess the reasonableness of the behaviour if the disutility is scaled down from a significant unexpected loss to a predictable loss. [420] The morality of loss spreading is grounded within 'meeting the needs of individuals and seeing a reduction in the negative effects of losses as worthy goals'. [421] This distributive notion may help to determine whether it is *reasonable* to exempt the media from liability of invading others' privacy right by virtue of POMOPI defence which may consequently and unjustifiably, as this thesis argues, impose the costs of harmful activities caused by the media, who reap their benefits, on the shoulders of the victims of such publications.

3. 4: Concluding remarks

This Chapter has mapped the overlap between defamation and privacy, and the theoretical framework which provides the lens through which this study's research questions will be examined. This Chapter has introduced the conceptual foundations of dignity, sociality, and general personality right accounts that in turn conceptualise the relationship between the interests of reputation and privacy in order to explain the overlap between defamation and privacy in English law. This is important to evaluate the recent judicial approaches to

[419] Michael L. Wells, 'The Past and Future of Constitutional Torts: From Statutory Interpretation to Common Law Rules' (1986) 19 Conn. L. Rev. 53, 70.
[420] Keren-Paz, (n 45) 89.
[421] Ibid.

applying defamation rules within privacy cases which involve reputational considerations. In order to provide a further conceptualisation of the overlap, this Chapter has also discussed the relationship between privacy and reputation in Strasbourg's jurisprudence. This consequently brings to light the crux of the quandary within English law relating to False privacy (false private information). This Chapter has thus identified and explained how privacy could indirectly be protected under defamation law and how reputation may concurrently be protected under MOPI. This Chapter has also introduced the framework used to analyse the impact of the overlap upon defences, interim injunctions and damages. It has provided an overview of various perspectives. These include coherence lens; economic analysis (efficiency); feminist analysis; access to justice; procedural rule of election; and distributive justice perspectives. The chapter explicates how each of these lenses could benefit, enrich and promote understanding the considerations at stake resulting from the overlap between defamation and privacy. In summary, this chapter has provided a greater understanding of the problems resulting from the English courts' decision to include false private information within the protective scope of MOPI. The concept of the overlap between defamation and privacy, as this thesis concludes, is beyond the mere set of facts which may allow the claimants to bring simultaneously the legal proceedings of defamation and privacy torts. It is, above all else, a matter of conceptual interaction between the private life and reputation, which represent the protected interests of such torts. Based on the accounts of dignity, sociality and personality right, the right to privacy could be truly undermined by the adversely external evaluations of others. The reputation, based on the esteem held by others, may also be undermined by the unauthorised publications of private information. The interwinding relationship between the private life and reputation may lead the publication of private information or defamatory information to inextricably cause dual effects on privacy and

reputation. The development of English torts of defamation and privacy (MOPI) may provide a practical evidence confirming the conceptual overlap between the interests of private life and reputation, which may be protected under each single tort. However, the overlap was not narrowed on a conceptual level, but it attains, as this chapter elucidates, a materialistic level when the falsehoods, if private, could be protected under MOPI action. This development triggers a controversy among scholars because it would undermine, as certain scholars argue, the coherence of legal system and increase the uncertainty and circumvention of certain legal rules in defamation law. These arguments and the counterarguments, advanced in this thesis, are critically examined and developed in the next chapter.

Chapter 4: False privacy: Avoidance of the overlap or Keeping the integrity of privacy law

4. 1: Introduction

The term of false privacy refers to the publication of private information the claimant either reveals its falsity or refuses to comment on its falsity and truthfulness. While English law clearly recognised the protection of falsehoods within the remit of MOPI, false privacy has provoked vivid criticism in the literature of media law because of the materialistic overlap between defamation and privacy law. Many scholars provide different arguments seeking to exclude falsity from the remit of privacy in order to avoid the overlap with defamation. In this chapter, the arguments presented in pursuit of the literature concerning the soundness to include or exclude the falsehoods from the protective scope of MOPI will be brought together in order to provide an argumentative answer to the research question of this chapter concerning *to what extent privacy law should protect false private information*. This thesis advances new arguments, based on the theoretical framework previously outlined, to support the current legal approach of English law of privacy that protects true, false and mixed private information. The structure of this chapter is built on the arguments advanced to exclude falsehoods from the remit of MOPI and the arguments of this thesis that emphasises on including the falsehoods within the scope of MOPI. The first section critically explores the arguments made against the current approach in the English jurisdiction. This section will bring together the various supporting arguments to preclude the falsity from its protective remit of privacy law. The second section, by contrast, articulates the arguments supporting the inclusion of falsehoods within the remit of MOPI. This section advances supportive arguments based on multiple perspectives encompassing the American false light tort, local coherence, efficiency, feminist analysis and the access to justice, to explain the doctrinal

necessity and theoretical soundness of including false and mixed private information within the remit of privacy.

4. 2: Critical analysis of excluding false private information from the scope of privacy law

False privacy has provoked strong criticism in the literature of media law about the conceptual and doctrinal soundness of including false private information within the protective remit of MOPI. Many arguments were advanced to explain the doctrinal and conceptual unsoundness of including false information within the protective scope of privacy. These arguments are mainly based on the ramifications of false privacy on MOPI and defamation torts. The main reason for such academic opposition relates to the willingness to avoid the undesirable overlap with defamation. In this section, I outline and critically discuss such arguments in order to elucidate, as the thesis emphasises, the shortcoming and deficiency of excluding the protection of falsity from the scope of privacy law.

A- The argument of breach of confidence

The historical relationship between the equitable action of breach of confidence and the misuse of private information action provided a ground to preclude the falsity from the scope of privacy. It is undoubted that each action ostensibly serves different and distinct purposes; the equitable action of breach of confidence seeks to protect information based on relationships of trust and confidence, whereas MOPI seeks to protect the individual's dignity, autonomy and control over her private information. [422] Such differences, however, should not preclude the law from being applied and developed consistently and coherently. [423] Based on

[422] Tanya Aplin, 'the Relationship between Breach of Confidence and the 'Tort of Misuse of Private Information' (2007) 18 King's Law Journal 329, 335.

[423] The link between privacy and confidentiality has been expressed by Lord Neuberger: ' However, given that the domestic law on confidentiality had already started to encompass privacy well before the 1998 Act came into force, and that, with the 1998 Act now in force, privacy is still classified as part of the confidentiality genus, the law should be developed and applied consistently and coherently in both privacy and 'old fashioned

this rule, the falsehoods should be precluded from the protective scope of MOPI because such type of information is also excluded from the protective remit of the equitable breach of confidence since the issue of falsity and the issue of confidentiality are inconsistent. David Rolph highlights that no breach of confidence was raised in respect of a publication of false information simply because the falsehoods may not constitute a subject of confidentiality. [424] For instance, in *Khashoggi v. Smith*, the claimant, a public figure, failed to obtain an injunction restraining the defendant, a former housekeeper, from disclosing and publishing confidential information obtained during the defendant's previous job. [425] The refusal was justified because the threatening disclosure contained true allegations of criminal offences despite the existence of defendant's obligation of confidence. Sir David Cairns distinguished between the defamation and breach of confidence actions; whereas the former constitutes the protection from false defamatory statements, the latter protects true confidential information.

The inconsistency between falsity and confidentiality was reiterated in *Interbrew SA v Financial Times Ltd.* [426] Here the court decided that, in order to establish the claimant's duty around identifying confidential information as one of the requirements of a breach of confidence action, concepts of falsity cannot be reconciled with confidentiality. Lightman J said, 'There can be no right of confidence on the part of the claimant in respect of the doctored information i.e. the false information'.[427]

confidence' cases, even if they sometimes may have different features. Consistency and coherence are all the more important given the substantially increased focus on the right to privacy and confidentiality, and the corresponding legal developments in this area, over the past twenty years' see: *Tchenguiz & Ors v Imerman* [2010] EWCA Civ 908 [67].

[424] Rolph, (n 13) 475.

[425] (1980) 124 S.J. 14

[426] [2002] EWCA Civ 274; [2002] EMLR 446; [2002] 2 229.

[427] Ibid. para. 25; Aplin & al. (n 334) para. [5.63]. Rolph, (n 13) 475.

This argument, however, may lose its strength if the information were related to private life because such information could be confidential, even if it is false. In this respect, there is no logical and fair reason to deny the confidential nature of the information because of its falsity. [428] It is illogical, for instance, to prohibit an individual from restraining a publication containing intimate information of her sexual life obtained by her ex-partner during the marital period, simply because such a publication encompasses inaccurate information. Furthermore, there would be no difference in the injuries inflicted by a non-consensual publication of confidential information upon those interests that are protected under breach of confidence regardless of whether such information was true or false. Paul Stanley rightly denies the difference within the disclosure of true or false confidential information concerning the medical and sexual matters, as in each situation an action of breach of confidence is potentially legitimate and viable under the law: [429]

'Suppose, for instance, that in the course of treatment a patient is tested for HIV, and the test is positive. The doctor discloses what she believes to be the patient's HIV status to the press…. It can make no difference that the test has yielded a false-positive result. Or suppose the press obtain intelligence that a celebrity has been seen having sex in a hotel with a mistress and publish a story about it. Can it make any difference that the celebrity in question was actually having sex with his wife? …. Intuitively, in none of these cases ought it to make any difference that the information is not accurate'.

Legal authorities in English jurisdiction have followed such a pragmatic, flexible approach that brought and maintained false confidential information within the ambit of

[428] Toulson & Phipps, (n 334) 87.
[429] Paul Stanley, *The Law of Confidentiality: A Restatement* (Hart Publishing, 2008) 15.

breach of confidence. For example, in the first instance of the landmark cases of *Campbell v MGN,* [430] Morland LJ rejected the defendant's submission that a proof of inaccuracy pertaining to the private assertions in question would undercut the premises of the action – namely the right to protection and redress against unauthorised publication-based disclosure of confidential information - by saying: [431]

> 'I reject as absurd Mr Browne's submission that because there are some errors of detail in the Mirror's revelation that Miss Campbell was attending therapy sessions at Narcotics Anonymous, for example as to the length of time that she had been attending such sessions, the information lost the mark of confidentiality'.

If the protection of confidentiality necessitates that the information it concerns be true, this would be inconsistent with the underpinning purpose of confidentiality. In such circumstances, the claimant would be required to disclose which information is true and which is false in order to protect the confidential information.[432] The same principle was reiterated in the leading cases of *McKennitt v Ash.* [433] In this case, Eady J refused to establish the legal protection of confidentiality on the basis of truth or falsity. If the claimant must spell out which information was true and which information was false, this would make such legal protection illusory and ineffective; since the touchstone of confidentiality is to protect the disclosed information. Based on these understandings, there would be no logical objection to bringing a breach of confidence action in respect of information adjudged confidential; irrespective of whether this information is true, false or mixed.

[430] *Campbell,* (n 167) [57]
[431] Ibid.
[432] Ibid. 86-87.
[433] *McKennitt,* (n 324) [78].

The confidentiality and privacy are profoundly linked and interconnected if the matter of the information is related to health [434] - and this can also be extended across other types of private information. Based on the rule that privacy and confidentiality actions to be developed with consistency and coherence, irrespective their different features, this may support the argument that falsity can be protected by privacy law. [435] Thus, it would be significantly inconsistent to protect an individual's confidentiality in respect of non-consensual disclosure of false information regarding their health issue(s), and then preclude such information from the scope of privacy.

B- The implications of false privacy on MOPI

With the legal recognition of MOPI as a direct cause of action to protect privacy right in English jurisdiction, many scholars argue that the protection of false information within the remit of MOPI may bring inconsistency among the requirements of such action. To begin with, Brian Pillans argues that the label of *Misuse of Private information* may preclude false information from falling within its protective scope, because false or non-existent information, logically speaking, cannot be actionable as such type of information could not be misused in the first place. [436]

Such an argument may not be tenable since the misuse concept under MOPI could take different forms, such as wrongful publication or revelation of private information and phone hacking. [437] The misuse concept refers to the unauthorised discovering, retaining, disseminating and hacking, watching, listening and recording of private information. [438] The

[434] William W. Lowrance, *Privacy, confidentiality and health research* (CUP 2012) 32-3.
[435] *Tchenguiz,* (n 423) [67] per Lord Neuberger.
[436] Brian Pillans, 'McKennitt v Ash: the book of secrets' (2007) 12 Communications Law 78, 81.
[437] *Campbell*, (n 5) [15] per Lord Nicholls of Birkenhead; *Mosley,* (n 33) [3 & 214]; *Gulati & Ors v MGN* Ltd [2015] EWHC 1482 [6].
[438] Moreham, (n 141).

mere dissemination of private information without consent constitutes interference with the individual's right to 'control the dissemination of information about one's private life' regardless of the accuracy or inaccuracy of such information. [439] In addition, MOPI, based on the legal precedents, is used as an umbrella to protect privacy rights from tortious infringements whether related to unauthorised publication or intrusion into individuals' private life. [440] A further implication between falsity and MOPI relates to the requirements to satisfy the first test in MOPI concerning the reasonable expectation of privacy. Paul Stanley and David Rolph question how a heterosexual individual could have a reasonable expectation of privacy in respect of the publication disclosing their homosexuality. [441] Put differently, a reasonable person would expect the right to keep their true sexual orientation private, and any false information about her sexual orientation would not be reasonably expected to be published in the first instance.

It is right that the test of reasonable expectation involves a degree of subjectivity depending on the assessment of the claimant that may cover a massive range of information. However, such expectation must be objectively reasonable to successfully engage the first stage of MOPI action. [442] In *Murray v Express Newspapers Plc,* [443] the Court of Appeal determined the factors that should be taken into account when determining the reasonableness of the claimant's expectation in MOPI:

> 'They include the attributes of the claimant, the nature of the activity in which the claimant was engaged, the place at which it was happening, the nature and purpose

[439] *Campbell,* ibid. [51]; *Gulati,* ibid. [111].
[440] *Cliff* (n 312) [416]; *Gulati*, ibid.
[441] Rolph (n 352); Stanley (n 429) 16.
[442] Moreham, (n 141) 643-5.
[443] (n 177) [36].

of the intrusion, the absence of consent and whether it was known or could be inferred, the effect on the claimant and the circumstances in which and the purposes for which the information came into the hands of the publisher'.

The private nature of information is the touchstone to determine to what extent the claimant's right of Article 8 ECHR was breached irrespective whether the private information is true, false or mixed. [444] By relying on Stanley's example that the claimant cannot have a reasonable expectation to keep her information concerning homosexuality private if she was heterosexual in the first place; one could argue that the claimant can reasonably expect the information concerning her sexual orientation must be private irrespective whether it was heterosexual, homosexual or bisexual orientation.

In addition, there is nothing in the Article 8 ECHR necessarily limits the scope of private life to only true information. In *PG v. UK,* the Strasbourg Court decided that 'Private life is a broad term not susceptible to exhaustive definition. The Court has already held that the elements such as gender identification, name and sexual orientation and sexual life are important elements of the personal sphere protected by Article 8'. [445] Moreham's definition of privacy could also reaffirm such argument because the unauthorised publication of private information, whether true, false or mixed, could infringe what is defined as the individual's freedom from unwanted access or their desire to be inaccessible. [446] In contrast to the arguments outlined by Rolph and Stanley, the publication of false information concerning sexual relationships still constitutes an intrusion into private life even it had never taken place

[444] *McKennitt* (n 12) [86]; *Cooper*, (n 331) at 102; Mark Warby & al., (n 205) 222.
[445] *P.G. & J.H. v. UK* [2001] ECHR 550 [56].
[446] Moreham, 'Privacy' (n 141) 635; Moreham 'Beyond' (n 141)

because such information related to individual's sexual orientation are clearly and obviously private. [447]

C- Implications of a tort of false private information on defamation

Whereas the falsity, as many authors argue, is the subject matter of defamation, there is no reason to create another cause of action to deal with publications involving false information. Brian Pillans and John Hartshorne call for a new tort of *creation or misuse of false (private) information.* [448] The scope of this action would encompass not only the publication of false private information but also any publication of private information in respect of which no approval was granted by the claimant whether the information were true or false.[449] However, Pillans and Hartshorne also argue that such a suggestion may be redundant since there are strong similarities between publication or creation of false private information and defamation. The first similarity relates to the falsity of the information that is presumed in both causes of action. In other words, since the concept of implied falsehood is central to the claim in both actions, this may weaken the justification for creating a new action to rectify such falsity because the claimant could instead use the well-established tort of defamation to remedy harms caused by the publication of false allegations.[450] Undermining of the law's coherence is arguably one of the main consequences arising from the overlap between defamation and privacy. In order to maintain the global coherence of law, the protection of false information should be reserved to the law of defamation whose rules were established

[447] Barendt, (n 188) 114; Iain Wilson & Brett Wilson 'Misuse of private information' insight (West Law, 16 January2015)https://login.westlaw.co.uk/maf/wluk/app/document?&srguid=i0ad69f8e0000016b61c451819cd64fbc&docguid=I244A04109D8111E4AD578A6BF3EF978B&hitguid=I244A04109D8111E4AD578A6BF3EF978B&rank=2&spos=2&epos=2&td=71&crumb-action=append&context=68&resolvein=true accessed 22 January 2018

[448] Pillans, (n 436); Hartshorne, (n 322) 98.

[449] Ibid. 100.

[450] Pillans, (n 436); Hartshorne, (n 322) 98.

prior to the recent law of privacy. [451] The global coherence lens requires the recent law of privacy to take into account the pre-existing legal rules of the whole legal system. David Rolph argues that in order to maintain the coherence of the whole legal system, there must be an assessment of privacy's impact upon other existing causes of action protecting dignitary rights, such as those relating to defamation. Attention is, therefore, due to avoid the subversions of the balance between interests in conflicts that underpin those actions. [452] Cheer also concurs with Rolph that the overlap between defamation and privacy would undermine the law's coherence because of the inconsistency of interim injunction rules applied in both laws. [453] Cheer outlines that the recognition of false privacy would undermine the coherence of defamation law already protecting a claimant from the wrongful publication of false information: [454]

> 'Proper regard for the coherence of the law suggests that a novel cause of action for invasion of privacy, in whatever form it takes, should be available only in respect of a true matter, with defamation imposing liability for false matter'.

Rolph also explains and justifies the separation between the scope of defamation and privacy on the basis of truth and falsity dichotomy: [455]

> 'Because its principles are designed to protect a fundamentally different legal interest, reputation, defamation law does not readily accommodate privacy protection as one of its aims or rationales. Defamation law should prevent people making false and

[451] Rolph, (n 352)
[452] Rolph, ibid.
[453] Cheer, (n 15) 314; the differences between interim injunctions rules in defamation and privacy will be discussed in chapter 6.
[454] Ibid.
[455] David Rolph, 'Preparing for a Full-Scale Invasion? Truth, Privacy and Defamation' (2007) 25 Communications Law Bulletin, 5-8.

disparaging statements about others in public; privacy law should allow individuals to control what true, but private, information about them is disseminated in public and what remains private. Any privacy protection afforded by defamation law was or should be incidental or indirect at best. The fact that recent reforms have arguably reduced or removed privacy protections from defamation law does not mean that the principles of defamation law as they now stand under the national, uniform defamation laws are somehow deficient. Properly understood, it is not the function of defamation law to protect a plaintiff's privacy'.

The second main similarity between false privacy and defamation relates to the nature of harms caused by the publication of false information. Hartshorne argues that in both publications, whether false private or defamatory information, the harmed party would suffer similar types of harms; in other words, the claimant would experience similar distress and embarrassment. The publication of false information, under both defamation and false privacy, would lead others to form a *misleading impression* about the claimant's personality.[456] Furthermore, based on similarity with regards to the nature of the harm caused, Hartshorne also argues that personality harms caused by false portrayals could be effectively corrected through a judicial decision serving both compensatory and vindicatory purposes. [457] O'Callaghan agrees with Hartshorne about the similarity of the injuries caused by defamation and false privacy, but he adds that such similarities could also be recognised in comparing the concepts of defamation and the false light in US law. [458] The undesirability

[456] Hartshorne (n 322) 102.

[457] Based on such argument, Hartshorne concludes that a similar approach of interim injunction rule should be applied in false privacy and defamation law. This argument will be discussed in detail in the coming chapters of interim injunction and damages. ibid.

[458] False light tort will be discussed in the next section.

of such overlap is related to the difficulty in establishing a claim to privacy for public figures because there could be a hidden motivation to protect their reputation interest behind every privacy claim. [459] In other words, privacy claims based on false facts might affect the integrity of privacy law itself since protecting the claimant's reputation rather than privacy might stand as a real motive of privacy proceedings as Tugendhat J concluded in *LNS v Persons Unknowns.*[460]

This argument, however, is predicated upon an unconvincing basis since defamation law refutably presumes the falsity of an allegation once the defamatory meaning of allegations in question was proved. [461] The presumption of falsity is justified due to the difficulty of proving the defamatoriness and falsity of an allegation in the same time; however, such falsity could be rebuttable if the defendant successfully raises the defence of truth. [462] Thus, all defamatory statements are presumably and refutably false, but not all false statements are defamatory. It is the claimant's task to prove the defamatory meaning, based on the relevant tests pertaining to such purposes, of the allegation in question.[463]

Rolph acknowledges as convincing the assertion that not every untrue statement is defamatory; however, he suggests that such a problem may be bypassed through a variety of defamatory tests that could be able to cover a broad range of false statements which could be actionable under one of those tests. [464] The variety of tests determining the defamatory meaning of a statement would provide significant protection against publications of false

[459] Cheer (n 15) 313.
[460] (n 28) [95].
[461] See chapter 2.
[462] Giliker, (n 117) 134.
[463] See the defamation tests in chapter 2.
[464] Rolph refers to the three main tests of 'lowering the claimant in the estimation of right-thinking members of society generally test', 'hatred, ridicule or contempt test' and 'shun and avoid test' explained previously in the chapter 2. Rolph (n 352).

information on the grounds of covering a wild quantity of falsehoods. This suggestion, however, is flawed because not only would it leave the aggrieved party without legal remedy to redress harms caused by false private but non-defamatory information; but also, because it may cause further doctrinal problems to defamation law itself as being explained below.

Firstly, the concept of defamation would be doctrinally distorted since defamation tests would be overly extended to include harmfully false information. [465] Eric Descheemaeker casts doubt on the justifications of the inclusion of the 'ridicule test' and 'shun and avoid test' within the remit of defamation law, because such tests cannot determine meaningfully what should be regarded as defamatory.[466] Descheemaeker claims that no reputational harms could result from a publication exposing the claimant to ridicule because she suffers a humiliation to her self-esteem and dignity rather than harm to her reputation in the eyes of others. [467] He also asserts that the same criticism could be levied at the second test of 'shun and avoid' under which allegations of shameful diseases and insanity were considered defamatory. Such involuntary allegations, as Descheemaeker argues, ought to be actionable under privacy law rather than defamation law because it is the claimant's privacy, self-esteem and self-worth that would be violated instead of her reputation. [468]

Such an approach may not only undermine the doctrines of defamation, but it would also undermine the concept of privacy. The inclusion of non-reputational (private) considerations within the protective remit of defamation affects the protection of privacy itself because it allows the fragmentation of privacy protection through different and

[465] Gary T. Schwartz, 'Explaining and Justifying a Limited Tort of False Light Invasion of Privacy' (191) 41 Case W. Res. L. Rev. 885, 900.
[466] Descheemaeker, (n 97)
[467] Therefore, Descheemaeker calls to abolish this test from the English law of defamation. Ibid.
[468] Ibid.

irrelevant causes of action that could also prevent justified treatment of alike cases rather than constituting a coherent and principled system. [469] If defamation law was used to protect 'privacy' interests disguised within a deserved reputation interest, an unjust outcome may result, since truth constitutes a complete defence in defamation law, as a publication of true information cannot harm a deserved reputation. [470] This result would defeat the purpose of protecting privacy, which is inherent in law governing the disclosure of private information, because it may allow the disclosure of private information without proper justification based upon the defence of truth. However, privacy law considers truth and falsity as an irrelevant matter in terms of affecting the individual's right to control the dissemination of their private information. For example, such right to control may be significantly affected by the publication of a person's HIV status irrespective of whether the medical result in question was factually true or false. [471] The main justification for protecting non-reputational (private) considerations within the protective scope of defamation, as Descheemaeker explains, refers to the absence of direct actions protecting privacy rights in English law. [472]

Such justification could be somewhat loosely grounded within the emergence of MOPI as a properly suitable cause of action locate private information within its protective scope irrespective whether such information was defamatory. Furthermore, there is a practical need to include falsehoods within MOPI scope since publications causing the claimant to be *only* shunned and avoided would hardly meet the new requirement of serious harm since

[469] Ibid.
[470] Ibid.
[471] Descheemaeker, (n 97).
[472] Ibid. This justification has also been cited in *Terry (LNS) v Persons Unknowns* when Tugendhat J noted the difficulty in fitting private considerations into defamation due to the lack of direct protection of privacy. (n 28) [96].

such words would neither cause nor tend to cause serious harm to reputation since they relate to involuntary behaviours. [473]

However, Descheemaeker's arguments were predicated upon the unconvincing ground because he separates privacy and reputation interests and argues that private (dignitary) information cannot involve reputational considerations. It is established, conceptually speaking, that both privacy and reputation are dignitary interests and the harms to privacy or reputation could be classified as dignitary harms. In addition, based on Descheemaeker example of HIV status, the practical difficulty of drawing a hard line between privacy and reputation in respect of the publications of medical records on sexual conditions.[474] Mann J refused, as a matter of principle, to eliminate the reputational harms from the realm of privacy on the grounds that the victim's reputation would undeniably suffer some sort of damage resulting from the negative public attributes.[475] Furthermore, in *Cliff v BBC,* [476] the reputational harms were taken into account in assessing damages in privacy cases, since the protection of reputation was considered as a common function of defamation and privacy law. The Supreme Court has explicitly endorsed the function of privacy law as an alternative means to protect reputational harms beside the primary function of defamation law which protects also such harms. [477]

The inability of defamation law to protect all false information (including false *private* information) unless such information is categorised as defamatory under defamation tests, motivated Patrick O'Callaghan to advance other justifications to explain the lack of protection

[473] Ibid; Mullis & Parkes, (n 126); Descheemaeker ibid.
[474] *Hannon,* (n 287) at 29.
[475] Ibid.
[476] *Cliff* (n 312) [345].
[477] *Khuja* (n 320) [21].

for false private information within the scope of defamation. O'Callaghan argues that living within interconnected societies may constitute a basis for accepting the offensive and distressing harms caused by the dissemination of false private information; as long as reputational interests are not adversely affected in the eyes of (those legally deemed) right-thinking members of society. [478] O'Callaghan points out that such sacrificing approach would be compatible with European Convention of Human Rights because the margin of appreciation afforded to signatory States may likely take into account the legal protection afforded to false information under defamation law and this protection may be considered as an adequate remedy. In other words, harms caused by false private information cannot be deemed comparable to those harms caused by serious true privacy violations related to personal identity that require legal protection, since such harms may significantly undermine the individual's fundamental aspects of her personality. [479]

It appears that O'Callaghan only values the importance of reputation and the necessity of legal protection to the reputational interest if wrongly tarnished; whilst he unjustifiably undervalues the harmful impacts and consequences of the publication of false private information. Consequently, the latter is excused and justified because of the necessity of social interactions; whereas the former should merit the attention of law if reputation is seriously harmed, as defamation law is subjected to objective checks. [480] In addition, O'Callaghan's argument extrapolated from the State's approach argues that what might appear a wide margin of appreciation supporting the adequacy of remedies (with regards to defamation) to protect false privacy might be overstated. That is, a signatory State may not

[478] O'Callaghan (n 6) 300-1.
[479] Ibid. 303-4.
[480] Ibid. 300-1.

have a broad appreciation of rights in respect of serious interference within private life. [481] Such a margin of appreciation should not be used in a manner leading to violation of the State's positive obligations as these arise under Article 8 ECHR. In the context of privacy versus freedom of expression, the Strasbourg Court framed damages as a remedy for wrongful interference with Article 8 rights as satisfying the State's positive obligations under Article 8 ECHR. [482] This means that the signatory States, based on a margin of appreciation, are free to choose positive methods in order to secure their compliance with that very obligation. [483]

However, the margin of appreciation should not be extended towards accomplishing a complete denial of any legal remedy for false privacy. O'Callaghan's argument may imply some extension in violation of the State's positive obligation to ensure Article 8 rights around respect for private life, because such obligations impose on signatory States the requirement to enact *positive* measures which seek to *secure*, not deny, effective protection for privacy against wrongful interferences in matters between private parties. [484] Thus, it would be highly inconsistent with the State's positive obligation to secure the right to respect private life if dissemination of personal information related to sexual activities was permitted, simply

[481] In *Mosley v. UK*, the applicant's pre-notification requirement on the grounds of the inadequacy of damages award in English law to restore his privacy as this had been violated by a deliberated publication of photographs and personal information, which the European Court rejected. It was on these grounds that the applicant argued: 'the only effective remedy in his case would were an injunction, a remedy which he was denied by the failure of the newspaper to notify him in advance'. The rejection was based on the broad margin of appreciation by which 'State authorities are, in principle, in a better position than the international judge to give an opinion on how best to secure the right to respect for private life within the domestic legal'. Therefore, the applicant's pre-notification requirement would be inconsistent with the margin of appreciation granted because such requirements could conflict with the chosen system when balancing competing interests, especially in the case of freedom of expression being at stake. See. *Mosley v. United Kingdom* Application no. 48009/08 at 109 [ECHR, 2012]; *A.D.T. v. UK* Application no. 35765/97 [ECHR, 2000]

[482] *Mosley v. United Kingdom*, (n 481) [120 & 122].

[483] Ibid. [107].

[484] Ibid. [106].

because of its falsity and non-defamatory contents, despite such activities involving the most intimate aspect of private life.

D- The undesirable overlap between defamation and privacy

The overlap between defamation and privacy and its undesirable effects on well-established rules of defamation law arguably represent the main anomaly caused by the protection of false private information within the remit of privacy. Such undesirable effects regarding the circumvention of defences and of the interim injunction rules of defamation are discussed in the next chapters, but here the debate turns on whether such overlap could be avoided if only defamation law protected from falsehoods as many scholars argue.[485]

The recent development of privacy law subsuming reputational harms within its protective remit may produce a substantive overlap beyond the ramifications of false information. Scholars, such as Thomas Gibbons and Andrew Kenyon, argue that defamation law should be reformulated to redress the evaluation based on false information, instead of focusing on protecting a reputational interest. [486] In order to ensure the coexistence of defamation and privacy torts which unavoidably protect reputation, Kenyon suggests redirecting defamation law from protecting the interest in reputation to the interest of not being evaluated on the basis of false facts; whereas privacy law should protect the interest of not being evaluated on basis of private facts. [487] This means that defamation law seeks to redress the harms caused by the wrongful dissemination of falsehoods which must require the claimant, as Gibbons and Kenyon argue, to prove not only the falsehoods following the

[485] Rolph, (n 352); O'Callaghan, (n 8) 286-7; Cheer, (n 15) 313; Hartshorne, (n 322); Gibbons, (n 95); Andrew T. Kenyon 'Defamation, Privacy and Aspects of Reputation' (2019) 56 Osgoode Hall Law Journal, 59.
[486] Gibbons, ibid.; Kenyon, ibid.
[487] Kenyon, ibid. 78.

US law, but also the harms caused by such falsehoods rather than initially presuming them.[488] In other words, they claim that defamation law should follow what Eric Descheemaeker describes as Bipolar model which requires two existing elements constituting a tortious cause of action: an identifiable instance of wrongful conduct which violates the claimant's right as defined under the law (the publication of false information); and a distinct loss causatively emergent from this initial wrong (reputational harms).[489]

This plenty of literature suggests removing the protection of falsehoods from the privacy remit in order to avoid the overlap and its implications on the coherence of longstanding tort of defamation. However, this removal, in turn, may undermine the coherence of privacy itself, because the claimant should indicate which private information is true and which false while the law of privacy exactly seeks to prevent such type of discussion. Moreover, such a suggestion might be ineffective in terms of protecting private information adjudged partly true and partly false. [490] For instance, In *WER v REW,* Gross J granted injunctive relief preventing the dissemination of an item about the applicant's extra-marital relationship published to REW's email-subscribers. [491] The applicant refused to discuss the truth or falsity of the information in question because such a revelation, in any event, would be harmful to the applicant and his family. Furthermore, Gross J accepted the applicant's justification for refusing to discuss the truth or falsity of such private information, since such a discussion primarily serves the media non-parties who 'are, naturally enough, going to make what they can of the information supplied to them'. [492]

[488] Ibid. 75-6; Gibbons, ibid. 607.
[489] More information on the bipolar model could be found in chapter 7 s. 3/C.
[490] *Cooper* (n 331) at 102.
[491] [2009] EWHC 1029 (QB) [4].
[492] Ibid. [13].

There would be a fundamental misconception to reserve the protection of falsehoods upon the law of defamation because the falsehoods could be addressed by alternative actions such as malicious falsehood and negligence. [493] The touchstone of defamation law is whether the information was defamatory; like the law of privacy that protects only private information irrespective of its truth or falsity. [494] Based on such analysis, there would be unavoidably substantive overlap between defamation and privacy if the information was defamatory *and* private, as the fourth group of cases of Tugendhat J's taxonomies in which information related to voluntary, lawful, personal and discreditable conduct could in turn equally provoke actions of defamation and privacy alike. [495]

Cheer suggests a forward-looking approach that seeks to merge the defamation and privacy torts into one form of the civil action emphasising on remedies rather than the nature of the words published. [496] The basis of such union is grounded within the shared roots of dignity and autonomy values inherent in defamation and privacy, and an overlap between them would seriously threaten their doctrinal purity in respect of interim injunction rules. [497] Cheer's suggestion seeks to follow a unified criterion granting an interim or final injunction in respect of publications containing defamatory, private, or both materials to avoid this overlap. However, it is immaterial whether the information is defamatory or private when issuing an injunctive order if no serious emotional distress was caused or likely to be caused by the publication. [498] Cheer uses the example of the new Act of Harmful Digital Communications 2015 (HDCA 2015) in New Zealand to support the statutory merging of

[493] Barendt (n 310) 89-90.
[494] LNS (n 28) at 96.
[495] Ibid.
[496] Cheer, (n 15) 321.
[497] Ibid. 318-20.
[498] HDCA 2015 s. 19 (5) a.

defamation and privacy, on the grounds that the Act's principles are sufficiently relevant to the determination of protective scopes around defamation and privacy. [499] Although it is not the intention of this thesis to discuss the details of HDCA 2015, nevertheless, it discusses the soundness of merging defamation and privacy in a unitary action.

However, it would not be possible to apply Cheer's suggestion within the English law because it would require a radical change of the tests of defamation and privacy. [500] There would be a complete change to the law of defamation and its well-established rules because the individual must prove the falsity of the statement complained of, and its serious emotional distress in order to obtain an interlocutory injunction to prevent the publication of what is now defamatory information. [501] Furthermore, such a suggestion would be also implausible because it would encompass other causes of action such as negligence, malicious falsehoods, deceit, breach of confidence and harassment. Finally, and most importantly, Cheer's suggestion keeps the dichotomy of truth and falsity as one of the core criteria upon which the interim injunction may be granted. [502] This dichotomy is not only irrelevant issue in the law to privacy, but this dichotomy might itself constitute another intrusion into private life. [503]

[499] The scope of defamation could be relevant to the Principle 6 of s. 6 HDCA 2015 that says: 'A digital communication should not make a false allegation' whereas the scope of privacy has relevance with principle 1 that 'A digital communication should not disclose sensitive personal facts about an individual'.
[500] Cheer, ibid. 324.
[501] See chapter 2.
[502] HDCA 2015 s. 19 (5) f.
[503] *McKennitt* (n 12) [78]; Hartshorne (n 322) 114.

4. 3: The supportive arguments of including false private information within the scope of privacy law

The arguments expressed in the previous section failed, as this thesis emphasises, to comprehensively build a conceptual and doctrinal ground to justify the exclusion of the falsehoods from the scope of privacy. This thesis turns now to provide its own arguments which support the protection of false private information within the remit of privacy law.

A- The argument of American false light

One of the arguments advanced to exclude falsehoods from the protective remit of privacy is the similarity between the nature of harms caused by defamation and false privacy under which the claimant would suffer a misleading impression about her personality. [504] O' Callaghan used the false light argument to support the similarity between harms of defamation and false privacy since the same argument has also been advanced between defamation and false light torts in US law. [505] The essence of this argument relates to the needlessness of recognising the false light tort if its protected interest and harms are typically similar to the interest and the harms protected by defamation law. Furthermore, Prosser and other scholars point out that the substantive overlap between false light and defamation is highlighted by the fact that both torts protect the same interest of reputation. [506] Such overlap is the main reason for rejecting false light within many American States. [507] For example, the

[504] Ibid. 102.

[505] O'Callaghan, (n 8) 293; Bruce A. McKenna, 'False Light: Invasion of Privacy' (1979) 15 Tulsa. L. J. 113; John W. Wade, 'Defamation and the Right of Privacy' (1963) 15 Vand. L. Rev. 1093.

[506] Prosser (n 50) 400; Edward J. Bloustein, 'Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser' (1964) 39 N.Y.U. L. Rev. 962, 991; Raymond Wacks, The protection of privacy (Sweet & Maxwell 1980) 171; Robin Baker Perkins, 'The Truth behind False Light - A Recommendation for Texas' Re-Adoption of False Light Invasion of Privacy' (2003) 34 Tex. Tech. L. Rev. 1199. Such overlap between false light and defamation was the main reason to reject false light tort in many States, such as Minnesota, north California and Texas..

[507] The false light tort is recognised in the common law of 43 States, whereas only 10 States did not recognise it. However, California State decided to dismiss it if the same facts could be actionable under defamation law. See Nicole Moreham & Tanya Aplin, 'Privacy in European, civil and common law' in Nicole Moreham & Sir Mark Warby (eds) The law of privacy and the media, 3rd edn, (OUP 2016) 107.

Texas Supreme Court, in *Cain v. Hearst Corp*, explained the reasons for rejecting false light tort: '(1) it largely duplicates other rights of recovery, particularly defamation; and (2) it lacks many of the procedural limitations that accompany actions for defamation, thus unacceptably increasing the tension that already exists between free speech constitutional guarantees and tort law'.[508]

O'Callaghan argues that the false light tort may be predicated upon, conceptually speaking, unsolid ground because there are some significant doubts about the protected interest in this tort. [509] Put differently, O'Callaghan questions how the law could recognise the protected interest within false light concerning our own views of ourselves, without producing chilling effects on freedom of expression. He argues that it would be hard to identify the authentic selves that were publicly mischaracterised by false light. O'Callaghan builds his argument upon the work of the American sociologist Erving Goffman, who holds that it is difficult to distinguish our authentic selves from the illusion created by our performances within specific social stages with differing audiences before whom an individual performs. The social façade or persona created by individuals' performances may also depend on the social impositions, constraints or socio-cultural interpolations society produces as these correspond to that individual's social class or occupation (i.e. politician or teachers). [510] O'Callaghan argues that it might be difficult to pin down the authentic self and distinguish it from the social front or façade because our life, as Goffman points out, would become troublesome if we ought to reveal our authentic self each time it differs from this front. [511]

[508] Cain v. Hearst Corp. (Tex. 1994). 878 S.W.2d [579].
[509] O'Callaghan, (n 8) 293.
[510] O'Callaghan, (n 8) 294-5.
[511] Ibid.

Based on this argument, O'Callaghan concludes that our social front or reputation would be adequately remedied by defamation law. If our reputation and authentic self were wrongly mischaracterised, the efficacy of applying false light might be in doubt on the grounds that the law would find it difficult to formally distinguish the authentic self from the illusion produced by our social role. [512] Therefore, defamation law has a stronger basis to protect our reputation (social front) than the tort of false light. However, this argument, despite its sociological premise, cannot deny the fact, as this thesis emphasises, that our privacy could be undermined by the dissemination of false information. This thesis uses the convincing arguments advanced in the literature of false light tort to support the inclusion of falsehoods within the remit of privacy. First, however, it would be imperative to compare the American false light with the English (false) privacy.

Comparing the American false light tort with the English privacy law

The American false light is one of the four types of privacy torts recognized in the American jurisdiction by the Restatement of Law, second (torts) under §.652E. [513] Privacy may be invaded via a false light if:

> 'One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if
>
> (a) The false light in which the other was placed would be highly offensive to a reasonable person, and (b) The actor had knowledge of or acted in reckless

[512] Ibid. 296.

[513] The four types of privacy recognised by the Restatement of Torts (Second): § 652 B- Intrusion upon Seclusion. § 652 (C) Appropriation of Name or Likeness. § 652 (D) Publicity Given to Private Life. § 652 (E) Publicity, which places the plaintiff in a false light in the public eye. The original formulation of those types was suggested by William L. Prosser within his memorable article 'Privacy'. Prosser, (n 50) 389; J. Clark Kelso, 'False Light Privacy: A Requiem' (1992) 32 SANTA CLARA L. Rev. 783, 790.

disregard as to the falsity of the publicized matter and the false light in which the other would be placed'.

Based on this article, the liability under false light tort requires a successful satisfaction of the following four elements: publicity, falsity, highly offensiveness, and malice. The first requirement, which the claimant has to prove, relates to the form in which an invasion of privacy takes place: the false light tort must reach the public at large through publicity, regardless of the form of communication whether oral, written or otherwise, to constitute an actionable invasion of privacy. The mere publication of information by the defendant to a single person or a small group of persons cannot qualify as publicity; that is, it does not mean the threshold of reaching a large public needed in order to consider specific dissemination of information as false light. [514] English privacy law, by contrast, considers an unauthorized communication of private information even between the defendant and few people as a misuse of private information. [515]

Secondly, the falsity of publicity is the subject matter of the false light invasion of privacy even though such false information is unrelated to the claimant's private life. [516] The falsity requirement has a significant role in assessing the existence of other related requirements because the degree of falsity may increase or decrease the probability of the statement's offensiveness, and the likelihood of actual malice with which the statement was made. [517] Such a requirement, however, is completely inconsistent with the English privacy

[514] The Restatement of Torts, Second, § 652D, comment a.
[515] *Burrell v Clifford* [2016] EWHC 294 (Ch) Richard Spearman Q. C. awarded damages of £5000 in respect of a letter containing private information sent by the defendant to an editor of a national newspaper without the claimant permission and any further publication.
[516] The Restatement of Torts, Second § 652E comment a
[517] McKenna, (n 505) 120.

law that requires the private nature of information in question whereas truth or falsity is irrelevant matters in privacy. [518]

Thirdly, the falsity made by the publicity is insufficient to constitute a false light unless such falsity is adjudged highly offensive to a reasonable person that could include false private and non-private information. [519] The highly offensive test requires that a significant misrepresentation of the claimant's character, history, beliefs or activities was caused by the false publicity. [520] On that point, English law takes the view that a publication of falsity itself is unable to give rise to privacy invasion unless such publication engages the test of a reasonable expectation of privacy. The English test of the reasonable expectation of privacy is broader than American test of highly offensive, because as the House of Lords identified in *Campbell v MGN,* that English test is not only much simpler, clearer, and less strict but it also prevents a kind of confusion with proportionality test. This is because the highly offensive test implies the issue related to the balancing stage of privacy regarding a degree of intrusion into private life. [521]

Finally, false light requires the claimant to prove that the defendant was malicious, namely she or he recognized the falsity or recklessly disregarded the truth or falsity of the subject matter of publicity in the suit. [522] This requirement was initially applied by the Supreme Court in *Time, Inc. v. Hill* in respect of which the constitutional considerations applied in defamation, designed to protect the freedom of the press, should also be applied

[518] *McKennitt* v *Ash* (n 12)
[519] The Restatement of Torts, Second at § 652E illustration 4; John Hartshorne, 'The protection of Prosser's privacy categories within English tort law' (2014) Torts Law Journal 37, 46.
[520] The Restatement of Torts, Second at § 652E comment C.
[521] (n 5) [22 & 135]; Hughes & Richards, (n 4) 178.
[522] However, the American Law Institute admits the possibility to hold a non-malicious publisher liable under false light tort only on the basis of negligence of falsity see: The Restatement of Torts, Second § 652E (Caveat).

within false light tort brought by private litigants where the challenged information involves matters of public interest. [523]

In this case, the defendant published certain false information about the claimant and his family who, having been held hostage by three escaped convicts and released without harm, later became the subject of a Broadway play. A national magazine (Time) published a photo in an article describing the details of the family's daily life and it falsely showed the exaggerated sufferance of the family members. [524] The claimant brought false light proceedings given such falsifications were not defamatory to allow bring defamation proceedings against the newspaper. The Supreme Court held that the mere proof of the falsity of the story was insufficient to recover damages using a false light tort; rather, the claimant has to prove further the actual malice of the defendant by indicating that s/he either knows the falsity or exhibits a conscious disregard towards the potential truth or falsity of the story. [525] The main rationale for imposing the defamation constitutional restriction of malice requirement in false light action was the willingness to mitigate the chilling effects potentially inflicted upon freedom of expression. [526] Free speech rights promote a robust exchange of ideas and opinions in cultural, social, scientific and political domains so that it may encourage a self-governance and a functioning democracy. [527]

[523] (1967) 385 U. S. 374.
[524] Ibid.
[525] Ibid.
[526] The difference between actual malice and common law malice has been explained in Cantrell v. Forest City Publishing Co. (1974) 419 U.S. 245, the latter is 'frequently expressed in terms of either personal ill-will towards the plaintiff or reckless or wanton disregard of the plaintiff's rights [and focuses] on the defendant's attitude toward the plaintiff's privacy'.' In contrast, the former refers to 'the truth or falsity of the matter published'. Joseph A. Page, American tort law and the right to privacy, in Gert Bruggemeier, Aurelia Colombi Ciacchi & Patrick O'Callaghan (eds) *Personality rights in European tort law* (CUP 2010) 60.
[527] *Time,* (n 523).

However, in *Gertz v Ropert Welch, Inc*., the Supreme Court held that the constitutional requirement of actual malice had been revoked from defamation proceedings against media defendants if the claimant was a private individual.[528] On that basis, it is for the States to decide the standard of liability in defamation law where the claimants are private individuals. Thus, it is an unresolved question of whether actual malice is a binding requirement in false light tort because of the Supreme Court in *Cantrell v Forest City Publishing Co.* left this matter to the States to decide which standard of liability is applied in false light cases. [529] English privacy law, in contrast, does not require actual malice to be proven by the claimant. However, malice could be relevant to the defamation defence of publication on matter of public interest (POMPOI) if applied in privacy. [530]

How false light can support false privacy?

Despite of the differences between American false light and the English false privacy, the false light tort may provide conceptual foundations that explain how the dissemination of falsehoods could undermine the right to privacy. The unauthorised dissemination of highly offensive/private information may represent an infringement of privacy right because injurious misrepresentation through placing an individual before the public in a highly offensive false light may consequently undermine our privacy, namely 'our concern over accessibility to others'. [531] False light/privacy undermines our self-determination, which

[528] *Gertz v Ropert Welch, Inc*. [1974] 418 US 323, 340.
[529] Ibid.; This is why the Restatement of Law, Second (torts) under §. 625E Caveat states that: 'The Institute takes no position on whether there are any circumstances under which recovery can be obtained under this Section if the actor did not know of or act with reckless disregard as to the falsity of the matter publicised and the false light in which the other would be placed but was negligent in regard to these matters'. It might be interesting to mention that 10 States apply the principle of *Gertz v Ropert* Welch, Inc. whereas 14 States apply the principle of Hill v Time, Inc. in false light cases. Moreham & Aplin, (n 507) 109.
[530] This issue is explored in the next chapter.
[531] Nathan E Ray, 'Let There Be False Light: Resisting the Growing Trend against an Important Tort' (2000) 84 MINN L REV 713, 745; Ruth Gavison, Privacy and the Limits of Law, (1980) 89 YALE L.J. 421, 423

means the self-ability to regulate its own affairs that is a kind of privacy, which would cause the aggrieved party either to withdraw from society as being publicly forced to confront a misleading image of herself or to defend such offensive falsehoods.[532] Undermining self-determination could affect privacy on the grounds that unauthorised false publicity might not only force an individual into seclusion but also thwart the free exchange of ideas and the formulation of informed decisions based on independent and critical thinking that privacy seeks to promote. [533]

False light/privacy may result in a wrongful loss of privacy because such dissemination represents a harmful interference in an individual's ability to control that dissemination of private information crucial to regulating how the public perceives and responds to them. [534] Furthermore, it represents an egregious method for invading privacy because, an individual could be compelled to reveal the truth of what she would keep private to refute the falsity of such dissemination. [535] For instance, if A, who is sterile, is publicly accused of impregnating B, A would lose their privacy in being forced to reveal his sterility (private information) for the purposes of refuting such false accusations[536]. Moreover, the dissemination of *believable* falsehoods may intrinsically harm an individual's very sense of herself by re-fashioning it within the social field and their self-relation. [537]

[532] Ray, Ibid. 746; McKenna (n 505) 115

[533] The effect of false light on political and democratic system adds a further justification to recognise false light tort. Ray, ibid. 744.

[534] Wade L. Robison, False light in Larry May, C. T. Sistare & Jonathan Schonsheck (eds) *Liberty, equality, and plurality* (Lawrence, Kan. University Press of Kansas 1997) 184.

[535] Ibid. 185.

[536] Pierre Le Morvan, Information, privacy and false light, in Ann E. Cudd and Mark C. Navin (eds) *Core concepts and contemporary issues in privacy* (Springer 2018) 86.

[537] Robison, (n 534) 185.

Based on this analysis, there are convincing arguments, conceptually speaking, to include the falsity within the protective remit of MOPI because the dissemination of highly offensive/private falsehoods may undermine the core of the right to privacy. However, there is an argument against the recognition of false light/privacy that could potentially cause chilling effects on the freedom of expression, because there are social benefits to participate in risky activities that seek to promote the democratic discourse and encouraging truth-finding. [538]

This argument, however, could be overstated and untenable since the false information, constitutionally speaking, is particularly valueless, and carries no First Amendment credentials. The truth may be thwarted in the event of citizens being misinformed, and inaccurate information advances no wide-open debate regarding matters of public interest. [539] Furthermore, it is unlikely that false light/privacy liability could, in turn, produce chilling effects upon the willingness of powerful media to deliver information within the public space. Rather, such entities with vast resources and influence must be responsible for privacy losses caused by publications. [540] In other words, deploying false light/privacy action may promote freedom of expression because it encourages people to exchange ideas and participate in a public debate with less apprehension around the prospect of powerful media freely exposing individuals to public but uncomfortable and embarrassing scrutiny. [541] Media publication of what is shown to be false information would diminish their credibility

[538] O'Callaghan (n 6) 293; Patrick O'Callaghan, Refining Privacy in Tort Law (Springer-Verlag Berlin Heidelberg 2013) 119; Hartshorne (n 322) 109; Rolph (n 352); Hartshorne, (n 519); Hillary Young, 'Anyone… in any medium'? The scope of Canada's responsible communication defence' in Andrew Keynon (eds), *Comparative Defamation and Privacy Law* (CUP 2016) 35.

[539] Ray, (n 531) 732.

[540] Perkins, (n 506) 1230; it is interesting to mention that George Keating argues that fairness perspective could impose a similar consequence on defendants who make profits from tortious conducts and it is highly unfair to leave the victims without remedy, further discussion on this perspective will be made in the next chapter.

[541] Ray, (n 531) 733-4.

and the public's confidence. [542] Journalists failing to face any legal liability resulted from violating others' private interests would, therefore, be potentially inconsistent with the ideal and re-enforced role of the free press in serving political and social purposes in a democratic society.[543]

False privacy, therefore, may have little influence upon freedom of expression because dissemination of false information without legal liability would adversely affect the public confidence in the reliability of the press and media and their role in a democratic society. [544] Based on the above, the formulation of the false privacy action may help to promote freedom of expression because it might lessen the irresponsible, unfair, and sensational publications involving inaccurate and harmful information that consequently compromise media credibility amongst the public. Moreover, false privacy may encourage creating justice because it would be truly unfair to protect the freedom of expression with regards to powerful media entities with huge resources at the cost of privacy of individuals. By virtue of the analogy between false light and false privacy, the recognition of false privacy within English law may be justified since the publication of false private information may not be actionable under defamation law unless the publication itself bears a defamatory meaning. In other words, whilst it may be correct that every defamatory statement that holds a person up to hatred, ridicule, or contempt would also be offensive to a reasonable person of ordinary sensibilities,[545] not every highly offensive statement could be defamatory.

[542] Ibid. 734.
[543] The effects of false speech will be further discussed in the next sub-section of efficiency.
[544] Haider Jinana, 'English false privacy vs. American false light: forward steps to reduce harmful disinformation and increase press reliability' (2020) 6 Under Construction @ Keele Journal https://view.joomag.com/under-construction-journal-issue-61-under-construction-journal-61/0961761001586888761
[545] Wade (n 505) 1121-6

B- The argument of local coherence lens

The scholars, who oppose the protection of false private information within privacy law, argue that the coherence of law would be undermined if false information, which is the subject-matter of defamation law, is included within the protective scope of privacy. Such inclusion would allow the claimant to circumvent the restrictive rules applied in defamation in respect of interim injunction or defences made in the sake of the defendant. [546] In other words, the recognition of false privacy would undermine the well-established law of defamation and its balance between competing interests of reputation and freedom of expression. Privacy and defamation have different structures, protected interests, defences and interim injunction rules. [547] The dichotomy of truth/falsity was posited as the key-solution to keep coherence with respect to the protective scopes of privacy and defamation law. Based on such views, the English judicial development concerning false privacy is considered as unacceptable progress because it leads to a problematic overlap with defamation and consequently results in an undesirable incoherence with regards to the whole legal system.[548]

The question raised at the outset is whether defamation and privacy are separate branches of law because local coherence focuses on a specific field rather than the whole of the law. [549] Cheer advances an argument which seeks to keep the law from falling into an undesirable incoherence caused by the overlap between defamation and privacy. Such an argument is based upon merging both torts under a unitary action, which aims to provide the

[546] Robert Stevens, Damages for wrongdoing in the absence of loss, in Jason N E Varuhas & N A Moreham (eds) *Remedies for breach of privacy* (Hart Publishing 2018) 112-3; Hartshorne (n 322); Rolph (n 352); O'Callaghan (n 6).

[547] The details of differences between defences and interim injunction rules will be discussed in the next chapters.

[548] See chapter 3.

[549] Raz, (n 340) 310.

victim of harmful publications with appropriate remedies, whether in terms of monetary awards or interim injunctions. [550] Cheer's suggestion shifts the emphasis from the nature of harmful publications within defamation and privacy towards the remedies for the harms irrespective of whether such harms were caused by defamation or privacy invasion. Through a local coherence lens, such suggestions ground defamation, privacy and other causes of action protecting the victim from harmful publications within one unified area or specific field of law.

However, Cheer's assessment of potentially merging defamation and privacy under one action based on the shared roots of dignity and autonomy might be overgenerous as closely scrutinizing defamation and privacy causes of action would lead to identifying clearly recognisable differences which prevent any chance of merger. Firstly, defamation and privacy differ on the nature of protected interests: the former protects the interest of reputation whereas the latter protects the interest of privacy. [551] Secondly, defamation and privacy differ in terms of the tests applied to decide whether the published information is defamatory or private. [552] Finally, the structure of defamation law, based on legal presumptions and correlated defences, differs basically with the structure of privacy based on the balance between private/public interests. [553]

If defamation and privacy are different and separate areas of law, the question is how could the coherence of defamation and privacy be promoted? The dichotomy of truth/falsity was used to maintain the coherence of privacy and defamation law where true information

[550] Cheer (n 15) 321.

[551] Rolph (n 452); Such difference could not be undermined by the fact that reputation may be tarnished by a publication of defamatory and private information as well as privacy might be invaded by a publication of private and defamatory information. See chapter 3.

[552] See chapter 2.

[553] The details of defences in defamation and privacy will be discussed in the next chapter.

ought to form the subject of privacy whilst defamation should protect false information. [554] The question raised in this regard is whether such dichotomy truly preserves the coherence of defamation and privacy. The answer to such questions requires scrutiny and a careful explication of core elements of both torts in order to conclude whether falsity increases defamation's coherence and truth increases privacy's coherence.

Mere falsity as an aspect of published information is insufficient to bring defamation proceedings; such information should initially be defamatory (based on defamation tests), in order to bring such action whereby the question of the falsity of such defamatory statements is legally presumed and can be conversely refuted using a truth defence. [555] The touchstone of defamation is whether the information in question is defamatory, and the question of falsity and truth is a question of legally refutable presumption upon which a defence via proof can be predicated. [556] Similarly, the touchstone of privacy is whether the information in question is private; and the question of truth and falsity constitutes an irrelevant matter. [557] Furthermore, there is no principled reason to restrict the protection of false information within defamation law which excludes it from the scope of privacy. [558] For instance, false statements could also be protected by other causes of action such as malicious falsehood[559] and negligence. [560] Thus, defamation law cannot protect false private but non-defamatory information because it does not satisfy the requirement of defamatory meaning and it is

[554] Rolph (n 352); O'Callaghan (n 6); O'Callaghan (n 538); Hartshorne (n 322).
[555] Rolph, ibid.
[556] Giliker (n 171) 134-4; The justifications of truth defence will be explained in the next chapter.
[557] *McKennitt* (n 12) [79]; O' Callaghan (n 6) 300.
[558] Barendt (n 310) 89.
[559] *Joyce v Sengupta* [1993] 1 WLR 337 (CA).
[560] *Spring v Guardian Assurance plc* [1995] 2 AC 296.

illogical to prevent the victim of such disclosure from having legal recourse by forcing her to bring an irrelevant cause of action.

To overcome this logical argument, Rolph found in the diversity of defamatory tests available within defamation law a real protection covering wide quantity of false private information. There, the non-reputational considerations could be deemed defamatory although the claimant suffers no reputational loss such as defamation based on the shun and avoid test and the ridicule test. [561] However, such argument would undermine the coherence of the defamation as being merged with privacy considerations because, as Descheemaeker argues, defamation law ought to protect the only reputational interest and such tests protect in fact the claimant's privacy rather than reputational interest. On the other hand, the coherence of privacy law would be significantly undermined because the truth constitutes a complete defence in defamation whereas the question of truth/falsity is irrelevant in the privacy protection. [562]

With respect to both writers, both arguments are based on an unjustified presumption; Rolph's and Descheemaeker's arguments are grounded upon the premise that private information *cannot* be defamatory and defamatory information *cannot* be private; whereas privacy and reputation *cannot* be distinguishably separated in a manner which affirms loss of privacy to have no reputational ramifications and loss of reputation no privacy ramifications. [563] If the information in dispute is not only false-private but also defamatory, there would be no fundamental problem with such overlap and duplication of actions because each cause of action in defamation and privacy has different protected interests and different

[561] Rolph (n 352).
[562] Descheemaeker (n 97)
[563] See chapter 3.

elements if successfully satisfied. In such circumstances, multiple causes of action could be brought in respect of the same set of facts such as the overlap between tort and contract. [564]

By contrast, the exclusive protection of false private information within defamation law in order to maintain its coherence would, as previously argued, significantly undermine the coherence of privacy law itself. Restricting the scope of privacy only to true private information would be inconsistent with the core of privacy protection itself because the claimant would be forced to affirm the truth of the private information published without their authorisation. In other words, forcing the claimant to discuss the truth or falsity of private information would be incompatible and inconsistent with the very reasons behind formally protecting privacy in the first instance. Such involuntary discussion and affirmation of the truth or falsity of private information interfere with the dignity, autonomy and right to control to dissemination private information based on which privacy law was recognised. [565] Furthermore, the dichotomy of truth/falsity between privacy and defamation may cause further interferences with the claimants' privacy, because by bringing privacy action the claimant endorses the truth whether totally or partially of the published private information is true and such endorsement would open the doors for further invasions of privacy[566]. Such compelling revelations renders the right to privacy incoherent because the victim of unauthorised publication of private information finds herself:

> 'compelled to expose details from his private life which he did not want to become public in the ensuing court procedure, because it may be necessary to reveal the private

[564] Ray (n 531) 751.
[565] Campbell (n 5) [51] per Lord Hoffman; Philipson, (n 16) 160.
[566] *WER* (n 490) [13].; Raz, (n 340) 286.

truth in order to prove that the journalist's report was untrue. This leads to new reports about his private life (as revealed in the trial)'. [567]

Such inconsistency, as this thesis argues, would be negated and consequently, the coherence of privacy law would be promoted in the event of false private information being protected by privacy. The question of privacy law's coherence imposes significant scrutiny regarding the nature of the information that should be private irrespective whether it is true, false or mixed. Shifting the emphasis from the truth/falsity dichotomy of the publications and placing it on the nature of the information (defamatory/private) would promote the coherence of both defamation and privacy law. The focus upon the nature of information would promote the coherence of law via increasing the consistency of each tort, but also by reflecting a monism and unity between its parts. Such strong monism and unity may, in turn, increase the privacy law's coherence from local coherence perspective. [568] Privacy law may reflect a strong monism if its touchstone relates to the private nature of information because the true, false and mixed information will be equally protected. Furthermore, emphasising the nature of the information may also strengthen the connections between true, false and mixed information protected by privacy law because of their private nature; this may reflect a strong unity of those parts falling within the scope of privacy. [569]

The same could be also said in respect to the coherence of defamation that would be significantly promoted if the emphasis is placed on the nature of the information protected by defamation law, namely defamatory nature, rather than the falsity of the information.

[567] M Prinz, 'Remedies against an Infringement of Privacy: The Effect of Sanctions and Compensation and their Proportionality, Council of Europe Conference on Freedom of Expression and the Right to Privacy, Strasbourg, 23 September 1999, cited in Hartshorne (n 5) 114.
[568] The idea of monism and unity has been discussed in chapter 3.
[569] Kress, (n 351) 666.

Similar to privacy law, the truth or falsity of the information is an irrelevant matter to its defamatory nature and the fact that the information is true cannot alter the injurious effect of defamatory information, nor can the fact that the information is false to render the information as defamatory, as explained within the Australian case of *Ainsworth v Burden*: [570]

> 'The objective truth or falsity of the matter complained of is irrelevant to its defamatory nature. To say of a solicitor that he is dishonest is injurious to his reputation (and thus defamatory of him), and it does not become less injurious because the statement is true. To say of a member of the Bar (irony aside) that he is universally regarded as the best advocate in Sydney is not injurious to his reputation and does not become injurious because the statement is false. That there is simply no relationship at all between the defamatory nature of a statement and its truth or falsity is well illustrated.....'.

Therefore, the claim that falsity is the touchstone of defamation law and that privacy could undermine the coherence of law, and defamation law, may be overstated. In addition, even if such a claim was right, there is no principled reason to prioritize the coherence of defamation law over the coherence of privacy. Therefore, privacy should protect private information regardless of whether it is true, false or mixed if one seeks to promote the coherence of law from a local coherence lens.

[570] Ainsworth v Burden [2005] NSWCA 174 [88] this case is brought from Australian jurisdiction due to its relevance to the issue of decision.

C- The argument of efficiency

The aim of this subsection is to examine to what extent protecting false private information under only defamation or privacy law is justified from an economic analysis perspective. The claim that false private information should be protected only by defamation law will be examined and then the focus will turn to the efficiency of that claim. From an economic analysis perspective, an activity may be socially optimal when its benefits at the highest level are not outweighed by the social costs imposed by such activity[571]. Information's optimal social value may be produced when its social value to everyone outweighs its production costs. [572] Based on such analysis, protection of false private information under defamation law would lead to an inefficient market outcome, because defamation rules would externalise the costs of publishing false information unless they are defamatory. [573] In other words, because the touchstone of defamation law is the defamatory nature of information, the publication of false private information would be increased until no benefit is produced from such publication – the social costs based upon injuries caused by such activity (reputational harms) are internalised (risk of liability under defamation law). The publisher would continue to publish false private information so long as such information is not deemed defamatory – which means no liability costs could be imposed in respect of publishing false but non-defamatory information.

Such outcomes might consequently be deemed unjustifiable from an efficiency perspective because of the significant social costs caused by the publication of such false private information. The over-publication of false information may generate additional social

[571] Shavell, (n 396) 40-1; Acheson & Wohlschlegel, (n 111) 349
[572] Shavell, (n 365) 139.
[573] Acheson & Wohlschlegel ibid.

costs relating to public trust in the media. [574] The claim that defamation law should protect false private information would incentivize the publication of falsehoods, due to the externalisation of liability costs of such non-defamatory information under libel law. However, such incentives could decrease (in the long term) the self-governance benefits of a free press in a democratic society because the public would be distrustful of media' publications whose role is to offer responsible and fair reporting that keeps institutions accountable. [575] The diminution of the public's confidence in the free press would thus also undermine the media' function as a watchdog in a democratic society to observe and expose public figures' wrongdoings because only very few people will trust the accuracy of such publications, and there might be concomitant incentives for public figures to engage in wrongdoing. [576] Such harmful ramifications, whether in respect of privacy loss or the public's confidence in the media, outweigh the short-term benefits of unchecked freedom of expression. Defamation law thus constitutes an inappropriate legal mechanism for achieving efficient outcomes within the information market because it cannot deal with the publication of false information unless such information is defamatory.

By contrast, privacy law may achieve an efficient outcome through internalizing social costs of publishing false private information by imposing liability on the publisher. The social costs of spreading false private information outweigh the benefits of such disclosure because only the disclosure of true and useful information in the marketplace could be justified on the grounds of concealment leading to inefficient consequences. [577] The flow of false private information is unjustified from a cost/benefit perspective because its concealment may

[574] Acheson & Wohlschlegel, (n 111) 381.
[575] Ibid; Ray (n 531) 734.
[576] Acheson & Wohlschlegel, ibid. 382.
[577] Posner, (n 377) 406.

outweigh the potential and short-term benefits for the media. Protecting false private information under privacy law would not only prevent or remedy the privacy loss of individuals, but it would also increase public confidence in media outlets and promote the public's trust in their publications. Privacy law may, therefore, provide an appropriate mechanism for achieving the efficiency goals because it may allow the disclosure of true private information that serves the public interest, and prevent or discourage the disclosure of false private information under which publication no public interest could be served. [578]

Overall, the claim that only defamation law should protect the unauthorised publication of false private information may be deemed unjustified from an efficiency perspective. Rather, such a claim would increase the flow of harmful falsehoods in the market of information without instituting any legal mechanism that forces publishers to internalise the social costs of their risky activities. [579] Consequently, privacy law would form the best mechanism for internalising such costs and allow only the disclosure of information that serves the public interest.

D- The argument of feminist analysis

Feminist analysis perspective could help to examine the plausibility of claims that (as many scholars argue) only defamation law should protect false private information. Such a claim has allowed leaving false private but non-defamatory information without legal remedy due to freedom of expression restrictions and the necessity of living within an interconnected society that oversensitive individuals must accede to. [580] Carole Pateman argues that the individuals' rights to control their private information cannot be removed from conceptions

[578] *McKennitt* (n 12) [79].
[579] Acheson & Wohlschlegel, (n 111) 349.
[580] O'Callaghan (n 6) 300-1; Rolph (n 352).

around the body, and the giving up of such control under employment or marriage contracts commodifies human beings for their personal services because the levels of personal autonomy and the individual's ability to work and control their body are inseparable. [581] Based on such view, the feminist analysis considers that the unauthorised disclosure of private information is treating people as commodities and results in hierarchical relationships between employer/employee, and husband/wife instead of equal relationships between such individuals. [582] If the false information were the exclusive arena of defamation law, this would create and reproduce subordinate relationships because the unauthorised publication of false private information may undermine the individual's control over their private information that cannot be separated from the concept of autonomy. [583] This is highly objectionable from a feminist perspective because it would allow the commodification of the individual through harmfully manipulating access to their private information without providing the harmed party legal recourse outside of that made available through the limited scope of defamation.

Restricting the protection of false private information to the scope of defamation would not only deny justice to victims but it may disproportionately affect the victims' ability to gain an adequate redress because the main remedy available in defamation law is monetary award whereas the issue of compensation is invariably marginal in cases involving females victims. [584] The main remedy able to provide real relief, from a feminist perspective, is the super-injunction, whether in its interim or permanent forms, because it can prevent harms from occurring in the first place. By contrast, the contention that false private

[581] Carole Pateman, 'Self-ownership and property in the person: Democratization and a tale of two concepts' (2002) 10 the journal of political philosophy, 20.
[582] Richardson (n 385) 156.
[583] Ibid. 155; Descheemaeker (n 97).
[584] Richardson (n 385) 159.

information should be protected by privacy law would, as this thesis argues, not only provide the victims with adequate legal action to remedy the unjustified harms but could also provide female victims with real protection for their privacy rights. Concretely speaking, the possibility of granting injunctive relief under privacy law whereas such relief is hardly available in defamation law. [585]

E- The argument of access to justice

The argument that this thesis emphasises is that the overlap between defamation and privacy may increase access to justice due to the possibility of granting injunctive relief under privacy law whereas it is rarely granted under defamation law. [586] There is no doubt about the fact that defamation and privacy proceedings are extremely expensive to the extent that litigants in possession of modest incomes are practically prevented from seeking legal remedies. For example, Sir Cliff Richard was 'substantially out of pocket' because he spent more than £3 million to protect his privacy right after an unjustified invasion by the BBC who agreed to pay him £2 million as legal costs beside £210 000 as damages. [587] Such problem became more complicated and difficult after the statutory instrument (2018 No.1287) decided to implement s.44 of the Legal Aid, Sentencing and Punishment of Offenders (LAPSO) 2012 under which success fees (SF) based on conditional fee agreements (CFA) are no longer recoverable in defamation and privacy actions. [588] Such an approach was developed in response to the legal obligations imposed on the UK government under *MGN v. UK*, in which

[585] The rules of injunction applied in privacy and defamation will be discussed in the relevant chapter.

[586] The difference between interim injunction rules in defamation and privacy will be discussed in the relevant chapter.

[587] Ashleigh Rainbird, 'Cliff Richard settles BBC case for half the £4.5million he spent on legal fees' *Mirror* (London, 3 SEP. 2019)

[588] CFA or alternatively called (no win no fees) is an agreement between client and lawyer based on which the latter' costs are payable only in successful cases. In order to avoid financial risks of unsuccessful cases, Solicitors charge a success fee that is an uplift on their legal costs between 20-100% recoverable from the losing party. Conditional Fee Agreement Order 2013 Art.3.

Strasbourg Court found that success fees represented disproportionate interference with the defendant's rights of freedom of expression under Art. 10 ECHR. [589] That is, it may remain practically impossible for less well-off litigants to face the legal costs of defamation or privacy law. Observing such similarities between defamation and privacy law from this perspective, in respect to the difficulties that powerless litigants face in relation to legal costs, may trigger a scepticism towards O'Callaghan's argument that enlarging the protective scope of privacy could increase access to justice. O'Callaghan claims that protecting the unauthorised publication of true and false information (mixed) under privacy law would increase access to justice, whereas restricting privacy to merely true private information would prevent a significant number of victims from accessing justice. [590] There might then be no practical difference for disadvantaged litigants when bringing defamation or privacy proceedings if both actions are subject to the same restriction of CFA and SF. [591] This would be highly inconsistent with the civil justice aims that seek to provide citizens with a right to action around protecting their legal entitlements. [592] Furthermore, such practical lack of access to justice may be deemed inconsistent with the state's role in facilitating the wronged party's exercise of the right of action to remedy wrongdoing and impelling a wrongdoer to provide such remedy. [593] O'Callaghan refrains from including the false private information within the scope of privacy in order to avoid the undesirable overlap between defamation and privacy without considering whether including false private information within the scope of privacy

[589] The Lord Chancellor and Secretary of State for Justice Mr David Gauke, 'Defamation and Privacy Costs Protection, House of Commons Hansard' 29 November 2018 https://hansard.parliament.uk/commons/2018-11-29/debates/18112922000014/DefamationAndPrivacyCostsProtection accessed on 5 September 2019.
[590] O'Callaghan (n 6) 286.
[591] The actions of malicious falsehood, breach of confidence involving publication to the general public and harassment, where the defendant is a news publisher, is also subject of the success fees restriction made in Statutory Instruments 2018 No. 1287 (C. 92).
[592] Genn, (n 390).
[593] Benjamin C. Zipursky, 'Rights, Wrongs, and Recourse in the Law of Torts' (1998) 51 Vanderbilt Law Review, 801.

might increase access to justice. [594] However, privacy law might, on balance, provide a better option when compared with defamation law due to its provision of injunctive relief. The reason for prioritising such relief, from an access to justice perspective, is the relative legal costs of such relief when compared with those in defamation and privacy proceedings. [595] This option would significantly decrease the subsequent trial costs in respect of actions seeking to remove unauthorised, published private materials. [596] If this is right, the overlap between defamation and privacy might provide the victim with a more accessible option to justice when compared with other options requiring inordinate financial resources. Accordingly, the inclusion of falsity within the protective remit of privacy would increase the opportunities for claimants to access justice through obtaining interim injunctions that are, practically speaking, less expensive than the cost of defamation and privacy actions.

4. 4: Concluding remarks

This Chapter has examined the main question of this thesis relating to what extent privacy law should protect false private information (false privacy) as this represents the core of the overlap between defamation and privacy. In order to assess where the balance may strike, the chapter has critically considered the arguments objecting to the recognition of false privacy. It has considered those arguments which seek to exclude false information from falling within MOPI's protective scope in order to prevent the overlap in the first place, as well as the justifications for claims in the latter regard that focus on the implications for defamation and privacy torts themselves. This Chapter has also considered the arguments for the recognition of false privacy and has evaluated the doctrinal and conceptual grounds for

[594] O'Callaghan (n 6) 286.
[595] See the sub-section of access to justice in chapter 3.
[596] *Mosley v Google Inc*. [2015] EWHC 59 (QB)

excluding falsehoods from the scope of MOPI. This chapter has concluded that an overlap, such as those between defamation and privacy which in fact is grounded in key conceptual foundations, is difficult to avoid through (as many scholars have argued) simply retaining the dichotomy of truth and falsity. In addition, this chapter discussed in rigorous detail the implications of excluding false private information from the scope of MOPI from different perspectives. By using a framework incorporating local coherence, efficiency, feminist analysis, and access to justice to examine the feasibility of excluding = false private information from falling within the scope of privacy, this chapter concluded that: firstly, the correlation between MOPI and the equitable action of confidence, by contrast to scholars like David Rolph, may provide a strong basis to include the falsehoods within the scope of both actions since the confidentiality, rather the truth of the information, is the touch-stone of breach of confidence. Secondly, there is no inconsistency between falsehoods and MOPI because the reasonable expectation test may be applied irrespective whether the information was true or false. Thirdly, the mere falsity cannot be a basis to include false private information within the scope of defamation law because the touchstone of defamation is whether the information was defamatory. This means that the recognition of false privacy may not only keep the coherence of privacy law since it protects the information once it is private; but false privacy would also keep the coherence of defamation law because the latter will only protect the information related to truly reputational considerations. Finally, the overlap between defamation and privacy may be materially unavoidable once the information in suit were false, private and defamatory. In particular, the Chapter concludes that the protection of false private information within privacy law is predicated upon a solid ground equally from doctrinal and conceptual perspectives. The chapter has provided effective evidences to support current legal standing of false private information. This chapter

has shown how the American false light may support false privacy since the dissemination of falsehoods may undermine the core of privacy interest related to exclusive control of the dissemination of private information. The local coherence lens may also provide a significant insight to support the recognition of false privacy because it may ensure not only the coherence of privacy law, but it can also protect the coherence of defamation law. This study has thus far used efficiency and feminist analysis perspectives to reinforce the current standing of false privacy. Applying such arguments may increase the efficiency of privacy law since it would reduce the dissemination of falsehoods (socially harmful activities) and increase the press reliability. The chapter has also concluded that the extending of privacy scope may not necessarily increase access to justice, as argued in the literature, because defamation and privacy actions are significantly expensive. Consequently, it is relatively hard for people of limited incomes to access means of judicially protecting their rights or to prevent such breaches. The overlap between defamation and privacy torts would be unavoidable if the false information were private and defamatory at the same time. The question in this regard is whether such an overlap between privacy and defamation would allow application of defences associated with the latter into the former. In other words, if the overlap is factually unavoidable due to the information in question being private and defamatory, would it therefore be feasible to apply the defences of defamation law within privacy proceedings in order to preclude the claimant-from circumventing the legal protection of defendant' rights well established in defamation law? This latter question is the research-subject of the next chapter.

Chapter 5: The impact of the overlap on defences in defamation and privacy

5. 1: Introduction

As seen above, the overlap between defamation and privacy is unavoidable once the information is false, private and defamatory. It is the purpose of this chapter to examine the impact of such unavoidable overlap on the application of defences. The fact, that both torts equally take into account the legal protection of the conflicting right of freedom of expression besides the protection of the interests of reputation and privacy, may shed lights on the coherence of the free speech protection if such torts overlap. In this regard, there are two correlated questions that may be triggered from the overlap concerning the reciprocal applicability of defences in defamation and privacy. This thesis examines to what extent the defences of defamation *should* be applied in privacy cases if these torts overlap. The analysis of the overlapping cases provides no definitive response to this question, but merely some judicial attempts reflecting a receptivity to apply some of defences in defamation, such as the defences of qualified privileges and the publication on matter of public interest, in privacy cases because such cases equally involve harms to the claimant's privacy and reputation interests. This thesis argues that a fair distribution of benefits and burdens among the members of society must be considered in assessing the reasonableness of the defendant's behaviour if the defence of publication on matter of public interest must be applied in the overlapping cases. Via applying the criteria of fairness and loss spreading within the distributive justice theory, this thesis argues that the journalist's belief should not be seen reasonable if her exemption of liability may cause unfair distribution of the Media risky activities among the members of society. The coherence of law may also be relevant to examine the appropriateness of borrowing the defences of honest opinion and qualified

privileges from the law of defamation to privacy. This thesis advances the argument of the inconsistency of applying defences based on the presumption of malice in privacy law.

The second question relates to the potential impact of the overlap on unifying or harmonising the defences in these torts. In doing so, this thesis tackles with this question by exploring the similarity (s) and critically examining the difference (s), if any, between the defences in such torts; and whether such differences are justified. This thesis argues that the overlap may provide grounds for harmonising the defences of the truth with public interest, and the honest opinion with the freedom to criticize. It is imperative to start with a summary of the defences of defamation and privacy law to facilitate mapping the consistency and inconsistency between them in order to examine their reciprocal applicability and harmonisation.

5. 2: Overview of defences in defamation and privacy

In the context of tort law, the presence of all elements of a specific cause of action established by the claimant may not be conclusive to definitively determine the liability of the defendant, because the latter may dislodge such liability by proving one of the recognised defences. The defence refers to the rule which relieves the defendant of liability despite the presence of all elements of the tort. [597] In this section, I outline the main defences in defamation and privacy that may be alternatively applied if the defamation and privacy torts overlap. However, this thesis precludes many defences that provoke no implication from the scope of this study, because they are equally recognised in defamation and privacy such as consent, estoppel, change of position. release, limitation and res judicata. [598] The limitations

[597] Andrew Dyson, James Goudkamp and Frederick Wilmot-Smith, 'Central Issues in the Law of Tort Defences' in in Andrew D. Dyson and James Goudkamp (eds.), *Defences in Tort* (Hart Publishing 2015) 3.
[598] Mark Warby and Victoria Shore, 'Justifications and Defences' in Nicole A. Moreham & Mark Warby (eds), *Tugendhat and Christie: The law of privacy and the media* (OUP 2016) 472; Eric Descheemaeker, 'Mapping Defamation Defences' (2015) 78 Modern Law Review, 641.

of this study also exclude other defences in defamation such as operators of websites, peer-reviewed statement in a scientific or academic journal and innocent publication. [599]

A- Overview of defamation defences

Truth (justification) [600]

Truth is a complete defence in defamation law, in respect of which the action would be dismissed if statements complained of were substantially true. [601] A truth defence is established if the defendant proves that the sting of libellous allegations was essentially true.[602] In order to avoid liability, the defendant has the onus to prove the truth of the allegations complained of because English law supposes it is difficult for the claimant to prove falsity. [603] Two rationales explain why the truth is non-actionable in English defamation law. The first rationale is that English law priorities the value of truth over the value of reputation interest; therefore, once substantial truth of statements complained of were proved, the reputational harms are justified. [604] The relationship between truth and defamation is, as Robert Stevens argues, based on the principle of equal freedom that states it is lawful to speak the truth, even if the speaker was malicious, because truth itself implies a genuine interest to all the public. [605] The second rationale to justify truth defence is that no injury is inflicted on reputation interest by publishing true statements. Therefore, the truth implies, on one hand, non-existence of reputational injury in the first place, and, on the other hand, only *deserved*

[599] See chapter 8 (conclusion).
[600] Defamation Act 2013 s. 2 (4) has abolished the common law defence of justification as well as justification defence in section 5 defamation Act 1952 and replaced them by the statutory defence of Truth.
[601] S. 2 (1) Defamation Act 2013.
[602] *Chase v News Group Newspapers Ltd* [2002] EWCA Civ 1772; [2003] EMLR 218 [34]; McBride & Bagshaw, (n 84) 280.
[603] *Reynolds v Times Newspapers Ltd* [2001] 2 A.C. 127 [92]; Mullis & Parkes, (n 26) 397; Paula Giliker, (n 117) 134.
[604] Decheemaeker, (n 598) 651.
[605] Robert Stevens, Damages for wrongdoing in the absence of loss in Jason Varuhas & Nicole Moreham (eds) *Remedies for breach of privacy* (Hart Publishing 2018) 106; Descheemaeker, ibid. 650.

reputation is entitled to legal protection. [606] The Rehabilitation of Offenders Act 1974, however, makes an exception to the truth as a complete defence because it prohibits the defendant from using such defence if she or he was malicious in publishing statements surrounding criminal convictions. [607]

Honest opinion (fair comment) [608]

The honest opinion defence exempts the defendant from liability if the words complained about are recognised as an expression of opinion or comment which is honestly made without malice. [609] This defence seeks to provide free speech rights with an effective and strong legal protection because it significantly gives individuals a guarantee to make honest expressions of opinion. [610] An honest opinion is not actionable simply because it represents the defendant 's interpretation of what has previously been asserted as primary facts by someone else and this interpretation bears no authority on recipients to believe in its meaning. [611]

According to the Defamation Act 2013, three conditions ought to be satisfied by the defendant in order to avail from the statutory defence of an honest opinion. Firstly, the statement complained about needs to be a statement of opinion. [612] Deciding whether words complained of are statements of fact or of opinion is a difficult matter, because a statement whether of fact or opinion depends on the whole context of the publication. [613] However, if

[606] *Chase,* (n 602) [33].
[607] The Rehabilitation of Offenders Act 1974 s. 8; *Reynolds,* ibid.
[608] Defamation Act 2013 s. 3 (8) abolished the common law defence of fair comment as well as section 6 Defamation act 1952.
[609] Alastair Mullis & Andrew Scott, 'Tilting at Windmills: The Defamation Act 2013' (2014) 77 MLR 87, 92; Descheemaeker, (n 598) 652.
[610] *Spiller v Joseph* [2010] UKSC 53 [86]; Mullis & Scott, 'ibid. 91.
[611] Descheemaeker, ibid. 653.
[612] S. 3(2) Defamation Act 2013
[613] Mullis & Parkes, (n27) 430-3.

the defendant failed to prove the facts upon which her comment is based, the statement complained of cannot be an expression of opinion. [614] Secondly, the statement complained of should explicitly or implicitly indicate the basis of the opinion. [615] This requirement is to allow the recipient judging whether the comment, based on supporting facts, is well-founded. [616] Finally, the opinion complained of should be held by an honest person either on the basis of facts which existed at the time of the publication of statement complained of, or before it if that fact was a privileged statement. [617] The opinion honestly made is no longer required to be a matter of public interest, because such opinion represents only the individual viewpoint on the matter of publication. [618] The requirement of a lack of honesty means, practically speaking, that the defendant has no honest belief in the truth of the statement (opinion) complained of. [619] In other words, malice may defeat the defence of honest opinion if the defendant did not genuinely hold the opinion expressed. [620] Malice must be proven by the claimant, but this task might be difficult in many cases because malice in this context depends on the defendant's lack of belief in the truth. Nonetheless, the defendant's failure to mention or prove a factual basis for the opinion may indicate the malice or dishonesty of the opinion complained of. [621]

Absolute privileges

The law places a complete immunity from being sued in order to let people speak freely without fear. [622] Absolute privileges, therefore, refer to the *occasion* in which the maker

[614] *Spiller*, ibid. [5].
[615] S. 3(3) Defamation Act 2013
[616] *Spille*r, (n 610) [3].
[617] S. 3(4) Defamation Act 2013
[618] Mullis & Scott (n 609) 93.
[619] *Thornton v Telegraph Media Group Ltd* [2011] EWHC 159 (QB) [24].
[620] *Tse Wai Chun v Cheng* [2000] HKCFA 86; [2001] E.M.L.R 31 [79]; *Spiller*, ibid. [67].
[621] Mullis & Parkes, (n 26) 458.
[622] McBride & Bagshaw (n 84) 289.

of the defamatory statement is completely immunized from legal liability. Absolute privileges, like the truth, enjoy also a complete immunity irrespective of whether such statements were true or false and whether the maker of such statements was motivated by malice. [623] There is a public policy to be wholly free from liability for publication of defamatory words, and such public policy is linked to freedom of expression considerations that have absolute priority over the interest of reputation. [624] There are a variety of absolute privileges, [625] such as parliamentary privileges,[626] publications ordered by the parliament,[627] judicial privileges, [628] communications made in respect of judicial proceedings, [629] fair and accurate reports of judicial proceedings publicly heard, [630], fair and accurate reports made in respect of public meetings proceedings,[631] and executive privileges made between the state's official members in respect to their official duties. [632]

Qualified privileges

Defamation law initially presumes malice once the defendant has passed defamatory statements to a third party, but such presumption could be rebutted if the defendant proves the right circumstances under which the statements complained of had been communicated. [633] However, the claimant may dislodge the defence of qualified privilege (replication of

[623] The malice is defined as the improper motives that intent to injure the claimant; whereas the express malice refers to the defendant's knowledge of the falsity of the statement or her reckless disregard of the truth or falsity of the statement. Simon Deakin, Angus Johnston & Basil Markesinis, *Markesinis and Deakin's Tort Law*, (7th edn, OUP 2007) 669.
[624] ibid.; Mullis & Parkes, (n 26) 461.
[625] For the purpose of this overview, it is unnecessary to state all absolute privileges due to their variety. Such detail may be found in Mullis & Parkers, ibid. 468-529.
[626] Article 9 Bill of Rights 1688.
[627] S. 1 & 2 Parliamentary Papers Act 1840.
[628] *Seaman v Netherclift* [1876] 2 CPD 53, 56.
[629] *Waple v Surrey* [1998] 1 WLR 860.
[630] S. 14(3) Defamation Act 1996.
[631] S. 7 and Para. 9 of Schedule Defamation Act 1952.
[632] *Chatterton v. Secretary of state for India* [1895] 2 QB 189.
[633] See chapter 1.

malice) by proving affirmatively that the defendant was malicious.[634] Qualified privileges are applied in situations under which the defendant may be exempt from liability of passing a defamatory incrimination, based on specific reasons that defeat the legal presumption of malice. [635] They refer to the communications made in respect to the nexus of duties and interests in which the communicator's conducts are subject of investigation. [636] Based on such privileged circumstances surrounding the publication, there is a prima facia presumption that the defendant was not malicious. However, such presumptions could be rebutted if the claimant positively proves that the publication was activated by malice. [637]

The rationale of qualified privileges refers to the public interest in allowing people who were under the duties or interests to communicate frankly and freely if the communication was made with good faith. [638] Qualified privileges, like honest opinion, could also be defeated if the defamer was malicious. The malice in these privileges could vary from a general meaning of ill-will or improper motives, to an actual or expressed malice; namely an absence of honest belief. Improper motives mean that the defendant uses the privileged occasions to injure the claimant, and in such a case, the defendant would lose the immunity of liability given in respect of qualified privileges. [639] Such immunity would also be lost if there is an absence of

[634] Descheemaeker, (n 598) 664
[635] Ibid.
[636] Eric Descheemaeker, 'A man must take care not to defame his neighbour': the origins and significance of defence of responsible publication' (2015) 34 university of Queensland Law Journal, 239,242.
[637] McBride & Bagshaw (n 84) 291; Descheemaeker, ibid. 242. Nonetheless, there is no single case law supports this possibility, because it would be too difficult for the claimant to prove how a privileged defendant has been activated by malice in making the statement complained of. Descheemaeker (n 597) 665.
[638] *Horrocks v. Lowe* [1975] A.C. 135 per Lord Diplock; In *Watt v Longsdon* [1930] 1 KB 130, for instance, the court found that the defendant, who was a director of Scottish Petroleum, was protected by qualified privilege when he showed the chairman of the board a letter containing defamatory allegations about the claimant, who was a managing director of Morocco branch of the same company, because if such allegations were correct then, there would be a duty for the defendant to show such letter to the chairman who also would have an interest in such a letter
[639] *Horrocks,* ibid.; Mullis & Parkes, (n 26) 733.

belief in the truth of the statement complained of. [640] Such absence makes a conclusive evidence of expressed malice, because such malice may undermine the justification of qualified privileges (namely there is no legitimate interest in protecting a deliberated publication of false and injurious information). [641] Furthermore, immunity would also be lost if the defendant was reckless in respect of the truth or falsity of the statements complained of, because such recklessness may equate with knowing the falsity of those statements. [642]

Publication on a matter of public interest (Reynolds defence)

The Defamation Act 2013 in section 4 has abolished the common law defence known as the 'Reynolds defence' and replaced it with a new defence of publication on a matter of public interest. [643] The Explanatory Notes of the Act stated that the new defence is based on and inspired by the common law defence of Reynolds. [644] The publication on matter of public interest defence consists of two requirements (tests): the publication matter must relate whether totally or partially to the *public interest* (public interest test); and the defendant's belief that the publication serves the public interest must be *reasonable* (responsible journalism test). The first test, as a matter of law decided only by the judge, could be a controversial one simply because there is no one exhaustive test to definitively determine the concept of public interest. [645] This task could be difficult with the fact that no definition of public interest was provided by the new Defamation Act 2013. However, the court of Appeal

[640] *Horrocks,* ibid.
[641] Mullis & Parkes, ibid. 734.
[642] *Horrocks,* ibid.
[643] S. 4(6) Defamation Act 2013.
[644] *Alexander Economou v David de Freitas* [2018] EWCA Civ 2591 [76]; Jameel & Another v Wall Street Journal Europe [2006] UKHL 44 [146] Baroness Hale; Mullis & Parkes, (n 26) 535; Weaver, (n 49) 89; Mullis & Parkers, (n 26) 533; Eric Descheemaeker, 'Three errors in the Defamation Act 2013' (2015) 6 JETL 24, 34; Eric Descheemaeker, 'Truth and Truthfulness in the Law of Defamation' in Anne-Sophie Hulin, Robert Leckey & Lionel Smith (eds) *Les apparences en droit civil*, (Yvon Blais 2015) 13; Eric Barendt, 'Freedom of Expression in the United Kingdom under the Human Rights Act 1998' (2009) 84 I LJ 851, 854.
[645] Mullis & Parkes, (n 26) 643-8.

in Reynolds case law offers general guidance to determine the scope of public interest in a responsible journalism defence that mainly includes activities related to political life, public administrations or institutions and elections. [646] In *Flood v Times Newspapers,* the Supreme Court held that publication on police corruption and its investigation in a proper manner constitutes a real public interest justifying the first requirement of the Reynolds defence. [647] However, it is argued that political matters, practically speaking, are the main subjects of publications that meet the requirement of public interest applied in Reynolds defence. [648] Public interest requirement should be decided by considering the whole story and there is no necessity to prove the existence of general concern in respect of all the pieces of the publication. [649] The second part of the statutory defence of POMOPI requires that the defendant had a reasonable belief that the statement complained of was in the public interest. [650] This requires the court to take into account all the circumstances of the case and assess if the editorial allowance was appropriate. [651] To achieve such a goal, the court must assess whether the steps taken in gathering and publishing the publication were responsible; namely, to what extent the defendant was reasonable to believe in the truth of the allegations complained of.[652] Lord Nicholls stated a non-exhaustive guideline of ten factors by which the court could assess whether the publication complained of met the standards of responsible

[646] *Reynolds* (n 603) [176] per Lord Bingham.
[647] *Flood v Times Newspapers Ltd* [2012] UKSC 11 [69].
[648] it could be interesting to indicate that the Reynolds test of public interest is between two extreme tests judicially rejected: the first, which is too subjective or a newsworthy test that requires too easy threshold based on audience target; whereas the second extreme test which is too objective was 'needed to know' because its threshold could be too onerous. Mullis & Parkes, ibid. 645.
[649] This means that editorial discretion plays a significant and exclusive role in deciding how the story ought to be introduced. *Flood*, (n 652) [132].
[650] S. 4 (1) b Defamation Act 2013.
[651] S. 4 (2 & 4) Defamation Act 2013; of Defamation Act 2013, Explanatory Notes: section 4 para. 29; *Flood*, Ibid. [79] Lord Philipps emphasised; *Hunt v Times Newspapers Ltd* [2012] EWHC 1220 (QB) [12] Eady J has identified these two elements by saying: 'Verification involves a subjective and an objective element. The journalist must believe in the truth of the defamatory allegation and that must be a reasonable belief to hold'.
[652] *Reynolds*, ibid. *Jameel* (N, 651) [53]; *Economou* (n 644) [84]; Mullis & Parkes, (n 26) 649.

journalism. [653] The court has the final word to decide what the responsible journalism standard is which can vary from case to case according to its circumstances. [654]

The role of malice in POMOPI provokes a hard debate between scholars on whether POMOPI is an extension of qualified privilege, or a new independent defence to decide whether the malice should play a role in such a defence. Paul Mitchell argued that the Reynolds defence is an extension of qualified privilege in which malice has a significant role, because this defence requires not only that the publication was responsible and in the public interest, but that the publisher should also not be malicious. [655]

However, there might be other motivations that should be considered, such as bringing the misconducts of public figures to light and holding them accountable for such misdeeds. [656] Malice, practically speaking, may be relevant matter to POMOPI if it refers to the concept of lack of honest belief in truth – whether in the sense of knowing the falsity of the allegation, or reckless disregard about the truth or falsity of defamatory allegations. This is because such defence requires due diligence and reasonable steps to verify the accuracy of the information in question and such requirements (if met) mean an implicit refutation of

[653] The ten factors are: '1. the seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true. 2. The nature of the information, and the extent to which the subject-matter is a matter of public concern. 3. The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind or are being paid for their stories. 4. The steps are taken to verify the information. 5. The status of the information. The allegation may have already been the subject of an investigation which commands respect. 6. The urgency of the matter. News is often a perishable commodity. 7. Whether comment was sought from the defendant. He may have information others do not possess or have not disclosed. An approach to the defendant will not always be necessary. 8. Whether the article contained the gist of the plaintiff's side of the story. 9. The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact. 10. The circumstances of the publication, including the timing' see: Reynolds (n 603) per Lord Nicholls.

[654] It is useful to indicate that the reasonableness test applied in s. 4 D. A 2013 and responsibility test applied in *Reynolds v Times Newspapers Ltd* are materially similar because they share the same rationale to hold a fair balance between the competing interests of freedom of expression and reputation. *Economou*, ibid. [86].

[655] Mitchell, (n 124) 20.

[656] Ibid.

express malice. [657] POMOPI excludes not only the express malice, but also dishonest behaviours (such as phone hacking and bribery) because the propriety of the defendant's conducts, as Lord Hoffman, expressed, 'is built into the conditions under which the material is privileged'. [658] Therefore, it could be odd to imagine a malicious publisher with a responsible behaviour because the defendant's proof of her responsible behaviour may implicitly and consequently indicate the absence of express malice. [659]

B- Overview of privacy defences

In the context of privacy, different defences could be raised to justify the disclosure of private facts. While public interest, which is the main defence applied in privacy, is explained in detail, this introduction explains briefly the defences of waiver of the right and public domain. If an individual sought the limelight or courted publicity by voluntarily making her personal and private information publicly accessible in order to become a public figure, she may waive her right to privacy. In other words, no legal protection is available when involuntary intrusion into her private life occurs, because her previous disclosure may imply consent to waive her privacy. [660] In *Axel Springer AG v Germany,* [661] the Strasbourg Court recognised this doctrine to a large extent when it found that the claimant's prior conduct with the media should be taken into account in assessing the claimant's 'legitimate expectation' to protect his private life that would be effectively reduced in certain cases. One could

[657] Ibid.
[658] *Jameel* (n 56) [46].
[659] Descheemaeker, (n 636) 246
[660] Warby and Shore, (n 598) 479; Phillipson, (n 16) 150.
[661] *Springer,* (n 5) [101]; This approach provoked some lively criticisms because it would open gates to invade individual private lives without any public interest justifying such invasion at all. Gavin Phillipson argues that waiver doctrine would deny the claimant's reasonable expectation towards her private life in the first place; furthermore, this approach would also wrongly equate between voluntary and involuntary disclosure of personal information. In addition, the voluntary revelation of private information ought to be considered as an exercise of the individual control over her private life, not an abandonment of it. See: Phillipson, ibid. 151; Warby and Shore, ibid.

observe that there is a kind of overlap between the consent and waiver doctrines, because voluntary disclosure of private information through the media might be considered as implicit consent to publish information of the same nature and seriousness,[662] as well as an assessment of public interest in the subsequent disclosures. [663]

Public domain, principally speaking, has no effect on the legal protection to the protected interest in the new action of misuse of private information. This is because privacy might be harmed by *further* unauthorised publications of private information entered in the public domain that follows on from previous unauthorised publications. [664] However, the public domain might affect the usefulness or effectiveness of an interim injunction remedy to ban intrusive information that already existed, was published, or known by the public. In *Mosley v. MGN*, Eady J declined an interim injunction order to prevent a newspaper from publishing personal information related the claimant's sexual life, because the fact of being viewed many thousands of times would render the order meaningless. [665] However, in *CTB v. NGN,* [666] Eady J refused to dismiss the interim injunction previously granted to prevent the defendants from disseminating information identifying the claimant and his sexual relationship with the second defendant. The judge rejected the defendant's argument that no purpose is served by the previous anonymity injunction due to the availability of such information on the Internet. [667] The judge found, contrary to the case of Mosley, the injunction may still serve a legitimate purpose to protect further publication of private

[662] *Theakston v MGN* [2002] EWHC 137(QB).
[663] Warby and Shore, (n 598) 479.
[664] Ibid. 493.
[665] *Mosley,* (n 33) [32]
[666] *CTB v News Group Newspapers Ltd & Imogen Thomas* [2011] EWHC 1232 (QB)
[667] Ibid. [14].

information concerning the claimant's sexual relationship which could be leaked by the second defendant. [668]

Privacy law protects individuals from unjustified intrusion into their private lives whether such intrusion made by visual images or verbal means; and each exposure of private materials represents new distressing and harassing intrusion. [669] Considering this approach, granting an injunction might be useful and effective relief to Mosley, because it would prevent him and his family from suffering further distress and harassment caused by new readers and viewers of his private and distressing story. [670] In *PJS v News Group Newspapers Ltd*, [671] therefore, the Supreme Court rejected the Court of Appeal's decision to dismiss an interim injunction order preventing the defendant from disseminating details of PJS's extra-marital relationships with two women, due to the public availability such private information on Internet after being published in different foreign jurisdictions. The Supreme Court found that the interim injunction application is based on the private nature of information, not on their confidentiality or secrecy – which might be significantly affected by a public publication in domestic or foreign jurisdictions. The Court recognised how such injunction is useful to protect the claimant's family, wife and children, from being a target of the press as well as the potential and subsequent intrusions into their private lives. [672] The public domain should have no impact on the grant and continuity of interim injunction orders if the requirements of Art. 12(3) HRA are satisfied. [673]

[668] Ibid. [19]
[669] Ibid. [24].
[670] *Mosley*, (n 33) [27 & 32].
[671] *PJS,* (n 154) [57].
[672] Ibid. [68].
[673] These requirements will be largely discussed in the next chapter.

English law shows that the notion of public interest could include different and sometimes overlapping categories of speech that, as Gavin Phillipson argues, significantly strike the balance in favour of freedom of expression or more precisely the freedom of the press, similar to the American approach. [674] Democracy requires a free exchange of information in political, economic, social, artistic, intellectual and educational spheres; however, the political debate has to be prioritised over other speeches in a democratic society. [675] In *Goodwin v News Group Newspapers Ltd,* [676] for example, Tugendhat J found that there is a public interest in reporting details of a sexual relationship between people working in the same public organisation and exercising official functions; the public interest lies in publicly discussing proper or improper standards in public service. The court must decide how public interest may be served: whether by publishing private facts or by concealing them. [677] Public interest is an elastic concept which could be enlarged or narrowed according to the circumstances. However, in *Von Hannover v Germany,* [678] the Strasbourg Court ruled a general standard to strike the balance between the competing rights in Article 8 and 10 ECHR which 'lie in the contribution that the published photos and articles make to a debate of general interest'. Furthermore, in *Axel Springer v Germany,* [679] the Strasbourg Court added other criteria that may strike the balance between private life and freedom of expression such as: how well known the person concerned is, what the subject of the report is, the prior conduct of the person concerned, the method of obtaining the information and

[674] Phillipson, (n 16) 136-7; Paul Wragg, 'The Benefits of privacy-invading Expression' (2013) 64 N. Ir. Legal Q. 187, 195; Moosavian, (n 202) 244-50.
[675] *Campbell*, (n 5)
[676] (n 154) [133].
[677] *Campbell*, ibid. [85].
[678] *Von Hannover,* (n 202*)* [76].
[679] (n 5).

its veracity, the content, form and consequences of the publication, and the severity of the sanction imposed.

Revealing hypocrisy or preventing the public from being misled is one of the forms of speech falls within the public interest exception. [680] The truth may be the core of public interest when the public had a false image or was deliberately misled on a specific matter. It is in the public interest to correct such falsehoods and address those misled by reporting the truth. [681] In *Mosley v News Group Newspapers*, Eady J emphasised that the truth is not a 'trump card' to invade the privacy of others, saying 'Nor can it be said, without qualification, that there is a public interest that the truth should out'. [682] Similarly, in *Hannon v NGN,* Mann J said that 'Telling the truth in a privacy case can be wrongful'. [683] Furthermore, in *Campbell v. MGN,* [684] Lord Hope pointed out that the right of the public to know that they had been misled by false information has a priority over the competing private interests, and hence correcting the false impression made by Campbell's previous publicity lies within the public interest exception. However, the truth should be confined within the narrower basis of misleading the public, and it should not be an independent ground to invade the intimate and private territories of others. [685] If Naomi Campbell refused to answer the question of her drug dependency, which was the core of public interest justification, [686] there would have been press scrutiny to explain the reasons for such refusal. This is why John William Devine argues that hypocrisy is an important means to protect the private life of public figures who are under press scrutiny and need more effective protection for their privacy due to the unlimited

[680] *A v B plc* [2002] EWCA Civ 337 [11].
[681] *Ferdinand,* (n 328) [68, 85]; Wragg. (n 674) 195.
[682] Mosley (n 33) [10].
[683] *Hannon*, (n 287) [56].
[684] *Campbell* (n 5) [58 & 117]
[685] Moosavian (n202) 248.
[686] *Campbell*, ibid. [36] Lord Hoffman.

environment of media.[687] That is to say, privacy law should arguably be *hypocrisy-supporting* to provide public figures an effective protection for their privacy from media' intrusive questions; however, such a view may extremely provoke an inconsistency within media role as a watchdog in a democratic society to reveal illegal or misleading activities.

One could, however, argue that *deliberate* hypocrisy (made through fabricated versions of celebrities' private lives in order to conceal illegal behaviours) should be separated from the scenario of hypocrisy made in respect of questions about embarrassing private information that no legitimate interest could be served in knowing the truth. In hypocrisy scenarios that have a genuine public interest, there is a serious motivation to put the record straight, for instance, revealing the hypocrisy of Campbell of her drug dependency. [688] However, the hypocrisy can be justified in other scenarios, such as asking questions about embarrassing private information, as this is a protected zone of privacy as there is no legitimate public interest knowing the truth. [689] However, there is a ground to argue that public interest would be served if details regarding the private life of role models in society were revealed. This is because such a disclosure might help the followers of such models to identify their immoral and unethical deeds as well as how such behaviours should be avoided. [690] This argument, however, may exaggerate the influence of immoral behaviours of role models on their fans because there is no definitive evidence that the followers would adopt

[687] John William Devine, 'Privacy and Hypocrisy' (2011) 3(2) Journal of Media Law 169, 175; Paul Wragg, 'A freedom to criticise? Evaluating the public interest in celebrity gossip after Mosley and Terry' (2010) 2 JOML 295, 310. Devine explains ''Consider the case of a footballer about whose sexuality there is press speculation. A refusal to answer press questions on this topic is highly likely to be viewed as confirmation that the player is homosexual. Given the prevalence of homophobia on terraces across the country, admitting that one is homosexual will inevitably result in one being the object of hatred and ridicule whenever one takes to the field. In such circumstances, the footballer has no reasonable alternative but to lie. However, once he lies, journalists are entitled to expose his sexuality to the world under the protection of PRS. He is, therefore, caught in a 'no win' situation'.

[688] *Campbell* (n 5) [151].

[689] Devine, (n 687) 177

[690] Wragg, (n 674) 196.

such socially harmful conducts. [691] Revealing crimes or serious misdeeds represents a category of speech that falls within a genuine public interest concept. [692] However, illegal or criminal activities do not provide freedom of expression an automatic licence or priority to invade or intrude privacy right. Such an invasion should be proportionate with the seriousness of illegal allegations. In other words, trivial crimes should not be given an automatic licence or *carte blanche* to invade the right to privacy. [693] Furthermore, reporting on a criminal investigation may not justify an invasion of privacy right if innocence was the outcome of such investigations. In *Cliff Richard v BBC*, Mann J made difference between reporting a matter of public interest such as police investigation and revealing the identity of the person under such investigation. While the former represents a genuine contribution to a debate of general public interest, Mann J that found the latter did not make such a contribution. [694]

5. 3: The impact of the overlap on defences in defamation and privacy

This section critically tackles the research questions related to the impact of the overlap on defences in defamation and privacy. It seeks to clarify the undesirability of borrowing certain defences, such as POMOPI and qualified privileges, from the law of defamation to privacy territory on one hand; and it provides an analytical ground to harmonise certain other defences, such as truth and freedom to criticize, to achieve a coherent protection concerning the freedom of expression on the other hand. The first subsection, therefore, explores and critically examines the judicial receptivity to apply defences of defamation in privacy cases from two perspectives: distributive justice and

[691] Phillipson, (n 16) 155; Gavin Phillipson and Helen Fenwick, 'National Irish Bank v RTE and finding the balance: breach of confidence, privacy and the public interest test in England and Ireland' (2004) 55 Northern Ireland legal quarterly, 118, 151
[692] *A v B plc* (n 680) [11].
[693] *Mosley,* (n 33) [111 & 119].
[694] *Cliff v BBC*, (n 312) [280-1]

coherence of law. The second subsection explores the impact of the overlap on harmonising the defences in defamation and privacy law.

A- Critical analysis of applying defamation defences in privacy law

The Court of Appeal in *Campbell v MGN* refused to apply defamation defence of public interest in privacy law because such torts are very different.[695] However, this judicial refusal turned into an obvious receptivity in *Mosley* and *Terry* cases due to the obvious analogy between the defences of public interest which may represent the commonplace defence in defamation and privacy torts. In *Mosley v MGN*, Eady J identified that privacy and reputational interests were harmed by the unauthorised disclosure of private information related to Mosley's sexual activities. The judge was clear that Mosley's claim is one of privacy and not defamation, even though his Justice admitted there could be a harm to Mosley's reputation caused by the false allegations related to the Nazi-style and death camp uniform. [696] The judge identified that obvious reason for the claimant bringing a claim of privacy, not defamation proceedings, was to avoid the defence of truth available in defamation. [697] Eady J concluded that false allegations cannot support any legitimate public interest justifying either the secret filming or the subsequent intrusive publications. [698] However, the recognition of reputational injury and the obvious analogy between subject matters of public interest invited the judge to reconsider the defence of responsible journalism (Reynolds) in defamation, even though

[695] *Campbell*, (n 167) [61].
[696] *Mosley* (n 33) [3& 26].
[697] Ibid. [144].
[698] One might question whether it was proportionate to put the record straight had the Nazi theme, and mockery of the Holocaust were true? Eady J did not discuss such an issue since his justice was convinced about the falsity of the Nazi theme and Holocaust mockery. Nonetheless, one could argue that proportionality test in privacy context requires the court to balance the public interest whether to maintain the privacy or to favour the disclosure because the mere existence of a public interest in the disclosure such as Nazi theme could not justify the disclosure of sexual details and secret video. Such sexual disclosure might hardly provide further support to public interest concept, if any, rather it made a serious intrusion into Mosley private life and his family in a life-ruining manner.

his justice acknowledged that tests of public interest applied in defamation and privacy are completely different. [699] Nonetheless, the judge concluded that the false allegations of Nazi elements and mockery of Holocaust victims were reached with unreasonable belief in their truth, because the journalist did not follow the rules required by the factors of responsible journalism. [700]

The judge analysed the steps taken by the defendant to verify the information as one of the factors of Lord Nicholls list. [701] The journalist's belief of such false allegations was a made with a casual, cavalier, slipshod or careless manner because the journalist's belief was based only on what they had been told – rather than on a serious and responsible investigation of truth. [702] Moreover, Eady J found that the purpose of the secret video was only to record the sadomasochistic activities in order to plead the defence of truth if libellous action was brought. [703] There might be a question whether the decision of publication of secret filming and details of sexual activities may meet the requirements of responsible journalism, had the steps of verification been responsibly conducted. The answer would be negative, since there are other factors that also should be considered to assess the standard of responsible journalism. [704] One of the main factors, that the defendant failed to satisfy, is whether the defendant sought to obtain and publish the claimant's comment on the subject-matter of the publication. [705] Eady J did not discuss this factor, because it is needless once the judge was satisfied that the publication was of irresponsible. The publisher neglected to get the claimant's comment, simply because the latter would definitively seek an injunctive relief

[699] Ibid. [141].
[700] Ibid. [170].
[701] *Reynolds* (n 603).
[702] *Mosley,* ibid. [162].
[703] *Mosley,* (n 33) [144-6].
[704] *Reynolds,* (n 603).
[705] *Reynolds,* (n 603).

to prevent any publication until the judiciary allows it. This factor is consistent with defamation law, because it is extremely difficult to obtain such a relief. [706] Eady J also mentioned the potential to borrow qualified privilege defence (from defamation to privacy territory) if a limited disclosure had been made to 'those in the FIA to whom he is accountable', who have an interest in knowing the information of the Nazi theme in order to assess Mosley's suitability as ahead of FIA. [707] Nonetheless, Eady J receptivity to borrow defences from defamation to privacy law was only *obiter* because his Justice did not rule and argue the point of law. [708] The judge left open the question of importing defences from defamation to privacy based on their analogy or overlap, and a future court reconsidered such an issue two years later by Tugendhat J in *Terry v Persons Unknowns.* [709]

In this case, Tugendhat J reconsidered the potential applicability of POMOPI into privacy law, if it overlaps with defamation law, to assess whether the applicant would satisfy the requirement of granting injunctive relief. [710] The court found that the uncertainty of privacy law and its relationship with defamation may require consideration of the editorial attitude or belief on assessing the public interest defence. [711] Tugendhat J believed that the gist of an injunctive application was to protect the claimant's commercial reputation rather than his private life. The reason to choose privacy law to seek an injunctive relief was to avoid the restrictive rule of *Bonnard v Perryman* applied in defamation. [712] This finding led the court to consider the relationship between privacy and defamation law and explore how the

[706] It might be interesting to indicate that Mosley unsuccessfully brought an application to the Strasbourg court to rule a requirement of pre-notification before any publication of private information engaged the Article 8 ECHR because of the inadequacy of damages as an effective relief in such cases. *Mosely,* (n 481).
[707] *Mosley*, ibid. [17 & 122].
[708] Warby & Shore, (n 598) 531.
[709] Reid, (n 31) 120.
[710] LNS, (n 28) [70].
[711] Ibid. [70 & 78].
[712] Ibid. [95 & 149]; The interim injunction rules in privacy and defamation will be discussed in the next chapter.

overlap between them in respect of voluntary, discreditable, and personal information. Therefore, this allowed the court to take into account that the 'belief of a person threatening to make a publication in the media is relevant on the issue of public interest' if the claimant chooses only privacy rather than defamation to proceed her claim. [713]

Tugendhat J, like Eady J, did not argue the point of law because the Terry case was concerned with an unsuccessful application of super-injunction. A further case, *ZXC v Bloomberg L.P.,* undertook the judicial task of considering the potential applicability of defences of defamation in privacy law. In this case, Nicklin J stated that the application of any defence available in defamation law should be allowed within privacy law if the claimant seeks a monetary remedy to recompense reputational harm. [714] In this case, the claimant brought a claim of misuse of private information in respect of a publication of an article disclosing his name as a potential suspect of a criminal investigation into his business. Nicklin J found such unauthorised disclosure of private information successfully engaged the first test of the reasonable expectation of privacy, due to its high-level of confidentiality as well as the factors in *Murray* list. [715] The court, according to proportionality test, found that the defendant failed to prove a sufficient public interest in revealing such private information; rather there is a strong public interest in maintaining the confidentiality of the information. [716] Nicklin J consequently held that the defendant was liable for unjustifiably breaching the claimant's right to privacy, and granted the claimant a permanent injunction, as well as an award of damages, amounted to £25,000. [717] In assessing the damages, the court ruled that damages for harm to reputation and vindication should not be awarded in respect of the publication

[713] Ibid. [70 & 96].
[714] (n 60) [150] iii.
[715] Ibid [125].
[716] Ibid. [127-133]
[717] Ibid. [146 & 156].

of true information, and any award on such a basis would be an unjustified interference with freedom of expression in Article 10 ECHR. [718] Based on such an approach, defences of defamation should be applied in privacy law if the claimant sought to include an element of reputation within the awarded damages irrespective whether such defences were inconsistent with privacy law. Nicklin J was obliged to reinterpret the meaning of 'esteem' as protected by misuse of private information in *Campbell v MGN* that should refer to the standing of an individual rather than an individual's reputational aspect. [719]

Distributive justice

It would be imperative to analyse the differences, if any, between the defence of public interest applied in defamation and privacy before analysing the impact of applying POMOPI in privacy law from distributive justice perspective. The scope of POMOPI is mainly focused on political speech related to matters to public life that may raise public concern. [720] This scope generally excludes matters related to private life, even though it is related to politicians, because the Reynolds defence gives priority to political speech concerning discussions on public life and its participants. [721] There are many subject-matters that fall within the public interest concept in defamation law, such as governmental conducts, corruption, safety, administration of justice, police conduct, and other conducts related to public bodies. [722] In *Reynolds v. Times Newspapers*, Lord Nicholls emphasised that

[718] Ibid. [149] iv. This matter will be discussed in detail in chapter 7.
[719] Ibid. [151]. This reinterpretation, however, could not be the last word on the issue of including the reputational aspect within privacy law because this case is permitted to an Appeal decision.
[720] *Reynolds* (n 603); *Flood* (n 647) [33]; *Serafin v Malkiewicz* [2019] EWCA Civ 852.
[721] Ibid.
[722] Mullis & Parkes, (n 26) 645.

information within the field of political discussion is likely to fall within the public interest arena, as the press utilises vital functions as a watchdog and a bloodhound: [723]

> 'The court should be slow to conclude that a publication was not in the public interest and, therefore, the public had no right to know, especially when the information is in the field of political discussion. Any lingering doubts should be resolved in favour of publication'.

Lord Nicholls emphasised the importance of political speech, in that media and the public should have 'freedom to disseminate and receive information on political matters is essential to the proper functioning of the system of parliamentary democracy cherished in this country'. [724] To achieve such a goal, the truth or falsity of defamatory statements is a neutral circumstance, because there are social benefits related to promoting democracy and truth-finding in risky publications containing falsehoods related to political matters. [725] The statutory defence of POMOPI shifts the standard of liability from prima facia strict liability to negligence-based liability. [726] The defendant would be liable if the publication does not meet the standard of responsible journalism. [727] The test of reasonable belief in the truth of the statement complained of depends on the judicial assessment of what should be the standard of responsible journalism. This may not be restricted to only the ten factors set by Lord

[723] Reynolds (n 603)
[724] Ibid.
[725] *Jameel*, (n 644) [62]; *Flood*, (n 647) [127]; Young, (n 538) 35
[726] Such a change in the liability standard in English defamation law may be a forward step toward adopting the American approach to a defamation action brought against public figures ruled in *New York Times Co. v. Sullivan* in which the claimant must prove not only the falsity of defamatory statements but also the actual malice of the defendant who knew the falsity or was recklessly disregard the truth or falsity of such statements. This means that the standard of liability in a libel action brought by public and official figures is higher than the general standard for fault as to falsity applied in defamation actions concerning private matters. However, there are many differences between English Reynolds and American Sullivan approaches because in English law, the falsity is presumed and the defendant must prove her reasonable belief in the truth of defamatory statements complained of in order to establish POMOPI whereas in American law the claimant must prove the falsity and actual malice of the defendant. See: New York Times Co. v. Sullivan (1964) 84S.Ct.710,721; Descheemaeker, (n 598) 641; David Mangan, 'The Relationship Between Defamation, Breach of Privacy and Other Legal Claims Involving Offensive Internet Content' (2017) Project Report. Law Commission of Ontario, Toronto.
[727] Descheemaeker, (n 636) 239; Descheemaeker, '(n 91) 639.

Nicholls in Reynolds defence, but also judicial authorities and the codes of Press Complaints Commission. [728]

Defamation law provides freedom of expression with a breathing space to engage in political speech without fear of such a strict liability. There are several benefits for the democratic society in the flow of political speech in order to improve effectively the citizens' ability to self-govern. By contrast, applying strict liability in defamation law over publications on political speech would not only reduce such benefits but it might allow more corrupt officials to be unchecked and let them use defamation law as a weapon to suppress criticism and facilitate the politicians' misconducts. [729] Lord Nicholls, in *Reynolds v. Times Newspapers,* emphasised on the importance of political speech that media and the public should have 'freedom to disseminate and receive information on political matters is essential to the proper functioning of the system of parliamentary democracy cherished in this country'. [730] However, such a priority to freedom of expression applied in defamation law may be inconsistent with the methodology followed in privacy law that requires to treat the competing rights of Articles 8 and 10 ECHR with equal weight. Freedom of expression may outweigh the right to privacy, only if the benefits of the publication are proportionate to the harms caused to the right to privacy. [731] Privacy law also gives the issue of truth and falsity a significant role in establishing the defence of public interest which requires the publication of private information to be *true* in order to justify the curtailment of privacy rights because the publication of *false* information may undermine the public interest defence. [732]

[728] Mullis & Parkes, (n 26) 652.
[729] Acheson & Wohlschlegel, (n 111) 348.
[730] *Reynolds* (n 603)
[731] *Campbell* (n 5) [113]
[732] *McKennitt* (n 12) [79].

However, the scope of defamation and privacy cannot be divided into black and white dichotomy because there could be information of serious public interest such as Nazi theme and Mockery of Holocaust victims accompanied with the publication of truly private information like sexual encounters of Mosley. In such case, there would be unavoidable to take into account the role of journalist's belief, and how such belief could be reasonable in light of the criteria of POMOPI (Reynolds defence). Distributive justice theory, as this thesis emphasises, may provide a crucial insight to decide whether the defendant's belief is reasonable as required by Article 4 (1) Defamation Act 2013. The author argues that the defendant's belief cannot be *reasonable* if it leads to unfair outcomes in respect of the distribution of benefits and burdens of a given activity. If the publisher reasonably but mistakenly believed that the publication of private information serves the public interest, such as a Nazi theme and the mockery or humiliation of Holocaust victims, [733] it would be unfair to leave only the victims such as Mosley and the five female participants bearing the negative consequences of such an intrusive publication.

Fairness demands that the public who benefit from such harmful activity should bear its costs and the publisher, such as the media, should be liable because they are able to spread such costs on the public who reap the benefits of harmful publications of private information. [734] Media intrusive activities should not be considered as *reasonable* if only the victims bared the costs of such activities because it is unfair to ask a group of individuals such as celebrities to bear costs of activities of the press that serve the benefit of society in general. Distributive justice, via the fairness criterion, imposes on those who reap the benefits of press activities to bear their costs. Rebecca Moosavian, however, advances a controversial argument to

[733] *Campbell* (n 5) at 117; *Mosley* (n 33) at 122.
[734] Keren-Paz, (n 416) 109.

justify invading the private life of people under media lights who should bear the costs of survival of media enterprises. She argues that the media industry, in order to commercially survive in the market, must enjoy an extent of freedom to publish salacious and prurient contents or celebrities' gossips that interest the public. [735] Such types of information help to sell newspapers in the market, which significantly provides the press financial means to keep its watchdog function in a democratic society. [736]

However, Moosavian's argument is highly objectionable from the fairness perspective for the following reasons. First, if the intrusive publications are in fact only for the financial sake of the media to ensure their economic survival, then fairness imposes strict liability to the media because it is grossly unfair to require victims to subsidise the costs of intrusions while the media reap the benefits. [737] Secondly, if the economic survival may justify the sacrifice of the private life of celebrities in order to keep the watchdog function of the press that is for the interest of the whole public, it is unjust, as Phillipson rightly argues, to put the price of such social good on the shoulders of a small group of people. [738] Based on this analysis, the society at large should subside the burdens of the survival of the press as a public good via the liability of the media who are able to spread such burdens as fairness imposes. Therefore, the judicial attempts to bring negligence standard of liability based on Reynolds defence into privacy law should take into account the distribution of burdens and benefits between participants in order to assess the reasonableness the defendant's belief. One could argue that media, as well as the public, are often interested in so-called kiss and tell stories

[735] Moosavian (n 202) 259.
[736] Ibid. 263.
[737] Keating, (n 414) 196.
[738] Phillipson also doubts the soundness of press survival based on intrusive publications of celebrities' private life. Phillipson, (n 16) 145.

that concern celebrities' love lives, friendship, or infidelity. [739] High-profile stars are wealthy celebrities and they are so financially powerful to bear the price of the media's survival, this, therefore, would reduce the strength of the fairness argument.[740]. However, the question of privacy disclosures of celebrities is often concerned with sexual and intimate information that involve female partners like in the Mosley and Terry cases.

In *Mosley v MGN,* Eady J identified an element of blackmail or threat against five women with whom Mosley had sexual relationships to reveal their identities to the public at large if these females refused to cooperate with the defendant. [741] Such blackmail reveals, in fact, the vulnerability of women in society, in which sexual double standards may be reinforced or employed as an aspect of socio-cultural injustice. [742] Such socially disadvantaged groups would be highly harmed if they unfairly bear the costs of media activities based on a negligence standard. The reasonable standard would not only make the position of such powerful media better off, but it would also render the disadvantaged group worse off.[743] Furthermore, there might be another undesirable distribution from the loss-spreading perspective if the burdens of harmful publications are borne only by the victims instead of being spread across many participants or individuals. [744] If only victims bore the costs of media intrusions in their private life, there would be a crushing and debilitating effect on the individuals' autonomous choices and personality development since the standard of liability in POMOPI defence focuses on loss-shifting rather loss-spreading. [745] In other words, shifting the costs of privacy invasion only on the shoulder of victims would discourage them from

[739] Witzleb, (n 35) 422.
[740] Mosley (n 33) [230]; Richardson, (n 385) 158.
[741] Mosley, ibid. [82].
[742] Keren-Paz, (n 45) 10; Richardson, ibid.
[743] See chapter 2: section 2.
[744] Keren-Paz, ibid. 86.
[745] John G. Fleming, 'More Thoughts on Loss Distribution' (1966) 4 Osgoode Hall Law Journal, 161, 163.

engaging in autonomous and different experiments or behaviours. [746] The media, therefore, should bear the invasion of privacy costs that could be spread over a section of society who benefits from media publications in order to encourage individuals in certain autonomous modes of activities. In addition, loss spreading may ensure the compensation of privacy harms – which is evidentially socially-beneficial – without financially ruining the defendant (media), since the latter is able to distribute such financial losses over a section of society who reap the benefits of media activities. [747]

The local coherence

The first issue of applying the local coherence lens is whether the rules of a specific law are consistent and reflect a strong unity or internal interdependency between them. [748] To begin with, privacy law, unlike defamation, does not recognise truth as a defence since it is inconsistent with justifications of recognising a right to privacy in the first place. [749] Furthermore, defences of honest opinion and qualified privileges are implicitly based on the absence of malice, which the law initially presumed if it is established that the statements were defamatory. [750] The role of such defences is to dislodge the presumption of malice, meaning that the defendant knows or recklessly disregards the falsity or truth of the defamatory statement – however, the claimant may defeat such defences and positively prove the existence of malice. [751] One might argue that an honest opinion defence has a narrow application in privacy law, since it applies to a statement of opinion rather than a statement of fact. However, there might be an overlap between such statements that are

[746] Phillipson, (n 16) 160.
[747] Fleming, ibid. 164.
[748] See chapter 2.
[749] Eric Descheemaeker 'Veritas non est defamatio'? Truth as a defence in the law of defamation' (2011) 31 Legal Studies, 1.
[750] See the first section in this chapter.
[751] Desmareaeker, (n 598)

regarded as statements of fact that could be presented as expressions of opinion, or vice versa. [752] If that is right, there could be an argument to attain a global coherence between defamation and privacy law, by requiring an element of public interest in the matter on which the defendant exercises her freedom of expression. [753] In other words, privacy could be indirectly protected if defamation law reintroduces the previous requirement of public interest on the subject matter of honest opinion abolished in the Defamation Act 2013. [754]

Based on this analysis, however, applying such defences into privacy would undermine the consistency of privacy law itself. If truth itself cannot justify the interference with the claimant's privacy, believing in the truth of private information should not exempt the defendant from liability. It is highly inconsistent in bringing defences built on the absence of malice into privacy law where the defendant's state of mind has no role to play in justifying the wrongful interference with privacy right. In addition, if privacy recognises such defences, the claimant must prove the defendant's malice in order to refute them. Malice, as previously explained, refers to the defendant's knowledge of the falsity, or her reckless disregard towards the truth or falsity of the information. This matter can add a further intrusion into the claimant's privacy, because she or he would discuss the truth or falsity of private information. [755] Furthermore, such an approach would render privacy law internally fragmented and structurally unsupported, because privacy law, unlike defamation, makes no initial presumptions of falsity or malice that could be defeated by defences of truth, honest opinion or qualified privileges. Such defences are coherent and consistent with the initial presumptions of falsity and malice made in defamation law, and it makes sense to allow the

[752] Warby & Shore, (n 598) 358-9.
[753] Rolph, (n 13) 477-8.
[754] S. 3 (8).
[755] *WER*, (n 490) [6-7].

defendant to establish defences of truth, honest opinion and qualified privileges in order to defeat the legal presumptions of falsity and malice for the sake of claimant. [756] Moreover, such defences, if applied in privacy law, would consequently conflict with the methodology applied in the proportionality stage that requires the court to take into account the importance of both rights because no right should have precedence over the other. [757] The judicial approach applied in *Mosley* in regard of applying a qualified privilege in privacy may entail a significant change in the methodology of Article 8 and 10 ECHR, because there would be no proportionality test between the competing interests, as rather there would be anticipated precedence of freedom of expression over privacy interest.

There is a ground to advance an argument to reach a strong coherence of protecting freedom of expression on one hand, and to achieve a strong consistency between defamation and privacy defences on the other hand. This argument relates to follow the methodology of balancing (proportionality) between the claim of privacy or reputation and the claim of freedom of expression without precedence to one right over the other. In other words, the harmonisation between defences in defamation and privacy to achieve a coherent protection to freedom of expression may support unifying the methodology applied in such torts. It might be time to adapt the methodology of proportionality applied in privacy tort to be applied as well in defamation tort so that establishing of the defences of defamation are not conclusive to relieve the defendant of liability; but the defendant must prove the value of revealing the information outweigh the value of concealing it. Based on this argument, truth

[756] See chapter 1.
[757] *Re S (FC),* (n 5) [17] per Lord Steyn.

would not automatically relieve the defendant of liability if there is not sufficient public interest served by the publication of defamatory and private information.

B- The impact of the overlap on harmonising the defences in defamation and privacy

Eric Barendt rightly argues that the overlap between defamation and privacy may support the claim to harmonise the defences of such torts. [758] The harmonising process, as this thesis emphasises, seeks to make consistency and compatibility between defences of defamation and privacy that must be, logically speaking, inconsistent and incompatible. This requires determining which defences are inconsistent, and which are consistent. This thesis argues that a potential harmonisation could be achieved between the defence of public interest and the defences of truth and honest opinion, whereas there is a clear consistency between the defences of public interest and absolute privileges.

Truth and Public interest defences

The relationship between the truth and public interest as separate defences may provoke a significant debate in respect of the overlap between defamation and privacy. To begin with, truth is a complete defence in defamation because speaking the truth is non-wrongful, not only because such speech is self-evident, but also because a reputation built on a false basis is undeserved of legal protection. Furthermore, truth coheres with the legal presumption of falsity once the claimant establishes the defamatory meaning of the allegations. [759] By contrast, privacy law is based on a methodology of proportionality and truth cannot be a justification to restrict privacy rights unless the public interest served by the dissemination of private information justifies curtailment. [760] This means that truth in and by

[758] Barendt (n 290)
[759] Descheemaeker, (n 756).
[760] *Campbell*, (n 5) [56].

itself cannot justify an invasion of privacy, because such a defence may deny the reason why a right to privacy should be protected in the first place. [761] Furthermore, private life and freedom of expression rights have equal weights in light of Strasbourg jurisprudence and domestic authorities, so the truth cannot be a complete defence in privacy law because there would presume precedence to freedom of expression over private life rights.

The tension between such conflicting approaches in respect of truth becomes acute in relation to the substantive overlap between defamation and privacy, since reputation is one of the protected aspects of private life under Article 8 ECHR. [762] The fact that both reputation and privacy are aspects of Article 8 ECHR would shed light on the justification of truth as a complete defence in defamation. It might be time to reconsider truth as a defence, because it is no longer absolute that the truth should prevail in English law. [763]

This is why David Eady J extra-judicially wondered to what extent the dichotomy of truth and falsity should be sustained as a black and white distinction in English law. [764] Alastair Mullis and Andrew Scott argue that this distinction should be kept, because there is a very strong public policy interest to allow a publication of true but not personal information, and, little could be gained to bring defamation action alongside an action of misuse of private information if the information was true and personal. [765] This, however, may be untenable if the information were private and defamatory because it would be logical to bring both actions to protect privacy and reputation rights caused by a single harmful publication. Since there are privacy considerations within defamation tests (such as tests of '*ridicule'* and *'shun and*

[761] Descheemaeker, ibid.
[762] See Chapter 3.
[763] Witzleb, (n 35) 432.
[764] Mr. Justice Eady,'Protecting Freedom of Expression in the Context of the European Convention of Human Rights' (City University, London, 10 March 2010) www.judiciary.gov.uk
[765] Mullis & Scott, (n 609) 53.

avoid') this may render the use of the truth defence problematic, because revealing the truth would harm the disguised privacy interest. [766] This tension, however, could be significantly assuaged if the exception of the Rehabilitation of Offenders Act 1974 had been used as a rule, since it implies a consideration of public interest to justify the publication. Rehabilitation of Offenders Act 1974 states that 'A defendant in any such action shall not by virtue of subsection (3) above be entitled to rely upon [the defence of justification [a defence under section 2 of the Defamation Act 2013] if the publication is proved to have been made with malice'. [767] This exception fits with the proposition that truth should be a defence if it was made for the public benefit. In other words, truth as a defence, instead of being a complete one, should be complemented by an element of benefit to the community. [768]

It may be useful to expand the exception of the Rehabilitation of Offenders Act 1974 to add the condition of public interest, in order to restrict the truth defence to 'truth in the public interest'. This solution is not strange in the commonwealth jurisdictions. The South African law of defamation, for instance, decides that the mere truth of defamatory statements cannot exempt the defendant from liability, unless the publication of such words serves the community benefit. [769] This suggestion might also reconcile with the recent categorisation of defamation cases made by Tugendhat J in *Sarah Thornton vs. Telegraph Media Group Limited,* when his Justice separated personal defamation related to 'imputations as to the character or attributes of an individual' and business defamation related to 'an imputation as to an attribute of an individual, a corporation, a trade union, a charity, or similar

[766] Descheemaeker, (n 97) 133.
[767] 1974 c. 53, Section 8 (5).
[768]In English jurisdiction, such a proposition has been rejected by the Faulks Committee in its final report 1975. Descheemaeker (n 756)
[769] South Africa and some Australian states require such a condition: Mullis & Parkes, (n 26) 391; Descheemaeker, ibid.; David J. Brennan, 'The Defence of Truth and Defamation Law Reform' (1994) 20 (1) Monash University Law Review 151.

body, and that imputation is as to the way the profession or business is conducted'. [770] In personal defamation, defamatory words related to misfortune and involuntary imputation such as disease, or an imputation makes her ridiculous, violate not only the claimant's reputation but also her privacy. [771] Such a suggestion would keep the coherence of the law of defamation and privacy because a restriction of privacy could be justified if dissemination of private information serves the public interest. Put differently, truth in a public interest defence in defamation coheres with a public interest defence in privacy, because the truth of private information should be approved in order establish that its publication serves the public interest, whereas the falsity, as Lord Justice Buxton emphasised, undermines such a defence.[772] This means that truth in and by itself cannot justify an invasion of privacy because such a defence may deny the reason why a right to privacy should be protected in the first place. [773] Consequently, if a public interest element is included within truth defence in defamation law, as this thesis argues, there would be meaningful harmonisation between defences of defamation and privacy since such actions could substantively overlap if regard of private and defamatory information.

Honest opinion and public interest defences (Freedom to criticize)

Another aspect of the interaction between defamation and privacy defences may be observed in the similarity between honest opinion and the freedom to criticise. The rationale of an honest opinion defence in defamation law is to allow the public to comment freely (and sometimes harshly) but always honestly. [774] Freedom of expression could be truly promoted if honest statements made in good faith, despite their defamatory meanings, are

[770] (n 619) [33] i. Tugendhat J also mentioned that both imputations could be carried in the same words.
[771] Ibid; Descheemaeker, (n 756).
[772] *McKennitt*, (n 12) [79].
[773] Descheemaeker, ibid.
[774] Mullis and Parkes, (n 26) 424.

protected.[775] Such a defence seeks to provide an individual a solid ground to protect her *ability or freedom to reason* since the opinion represents the understating of such individual towards the factual publications. [776]

Privacy law could restrict privacy rights on the basis of a similar justification applied in honest opinion in defamation law. In *Terry v Persons Unknowns,* [777] Tugendhat J emphasised that *freedom to criticize* may justify the revelation of information about private conducts which are socially or morally harmful; such as exploitations that occurred in private places and are made by powerful people against weaker people. The judge considered that public debate in a pluralistic society may leave limited space for the public to critique such harmful behaviours. Such a concept is an aspect of freedom of expression, as Tugendhat J suggested, that has similar importance with individual freedom to live as one chooses. Such importance explains, for instance, the willingness of sponsors to keep the public image of celebrities like John Terry away from social criticism in order to promote their products. [778] The flexible approach of Tugendhat J suggests that a public interest exception implies the right or freedom to criticise socially harmful behaviour**.** Social criticism of unacceptable but legal behaviours is a mechanism of paramount importance that has achieved successful results to engage the public in debate on many issues. [779] Freedom to criticise was supported by subsequent authorities that held that such freedom ought to be taken into account when assessing the public interest exception in the publication complained of. In *Hutcheson v News Group Newspapers Ltd*, the Court of Appeal upheld a refusal of the injunction to restrain publishing private information regarding the applicant's second family due to a strong public interest in

[775] *Tse Wai Chun Paul* (n 627) [20].
[776] Descheemaeker, (n 598) 654
[777] *LNS,* (n 28) [104].
[778] Ibid.
[779] Ibid.

publishing such information 'to authenticate the allegation of diversion of corporate funds for private purposes'. [780] The Court supported the Tugendhat J approach in Terry's decision that the *freedom to criticise* should be taken into account in assessing public interest justification to grant or refuse interim injunction application. [781] However, freedom to criticize is inconsistent with Eady J approach of neutral morality of free speech claim. Neutral morality approach excludes immorality from the scope of public interest justification. In *CC v. AB,* [782] an injunction was granted to prevent a husband from selling details of the sexual relationship between his wife and a well-known married footballer. Eady J opined that tittle-tattle stories that reveal sexual information about public figures or celebrities may interest the public but would scarcely be of genuine public interest. His justice stated that sexual morality has to be excluded from standards based on which the judiciary exercise discretion. [783] This approach was replicated in *Mosley v News Group Newspapers*, Eady J rejected the defendant's plea that depraved and adulterous activities are matters of public interest, because religious or moral disapproval should not be criteria to undermine human rights. Judges or journalists should be neutral in evaluating the sexual behaviour of others even they find them immoral and distasteful. [784] Eady J refused to outweigh the freedom of expression over the right to privacy, only because of the immorality and adultery of the claimant's private conducts. [785] Such a neutral approach submits that immoral behaviour provides no weight – neither to undermine the participants' right to privacy, nor to strengthen the claim of free speech. Eady J considered

[780] [2011] EWCA Civ 808 [46]
[781] Ibid. [35]; this approach has been also endorsed by Nicol J in *Ferdinand* (n 177) [64].
[782] [2006] EWHC 3083 (QB) [37]
[783] Ibid. [25].
[784] *Mosley* (n 33) [127-8].
[785] Ibid. [127].

that privacy itself protects private beliefs or conducts, even if they are socially harmful, unless its disclosure exposes illegality or hypocrisy. [786]

In *PJS v News Group Newspapers,* [787] the Supreme Court rejected the plea that the freedom to criticise represents a *limited public interest*. The court held that sexual infidelity cannot constitute a matter of genuine public interest if no illegal activities occurred within such individual behaviour. Freedom to criticize may provide anyone with a carte blanch to invade an individual right to privacy, simply because the disclosure of private information was made to criticise improper behaviours. [788] Such a justification leads to a deeper problem because it is incompatible with the justifications of privacy itself. Privacy is crucial to allow an individual to exercise free and autonomous choices and to develop certain controversial modes, whereas the absence of privacy would not only lead to penalisation of autonomous choices by others' criticisms, but also a deterrent to everyone from engaging in such choices.[789] Freedom to criticise, from a practical perspective, would require a court to decide if the claimant's private conducts are *reasonably* immoral, instead of identifying a particular benefit to the public gained by disclosing private information. This would provide a licence for individuals to breach privacy rights, because it is easy to assume that some sexual behaviours, such as homosexuality, are disapproved of in Abrahamic faiths, even though this is acceptable in a liberal society[790]. In other words, the concept of public interest exception would be so broad because the freedom to criticize may lower the threshold of public interest to encompass an excessive amount of private activities based on their potential immortality.

[786] Ibid. [131]
[787] (n 154) [21 & 22].
[788] Phillipson, (n 16) 159.
[789] Ibid. 160.
[790] Ibid. 161.

[791] If such function is allowed, privacy as a fundamental right will be put under the mercy of editors because they would have the final word to decide which private conduct is immoral and then should be publicly disclosed. [792]

Shedding lights on the concepts of honest opinion in defamation and freedom to criticize in privacy may indicate that both share an identical aspect of freedom of expression. However, freedom to criticize, as Phillipson rightly argues, protects the revelation of private information in order to let others express their critical opinions towards socially harmful behaviours; whereas an honest opinion defence protects the evaluative statements made in respect of factual or privileged allegations. [793] If the real purpose of the freedom to criticize is to protect public opinions made in respect of socially controversial behaviours, there may be an argument to say that criticism in privacy law, like defamation, should be based only on factual or privileged assertions. In other words, the analogy between a basis of honest opinion and a basis of freedom to criticize may push further the argument that freedom to criticize in privacy law should be made only in respect of facts or privileged statements as applied in honest opinion in defamation law. This means that the freedom to criticize should protect and enhance the public debate, rather than reveal private information. Freedom to criticize, therefore, must not be by itself a reason to invade a right to privacy, because such approach is inconsistent and incoherent with the justifications of the protection of privacy in the first place. Rather, there might be a benefit in concealing such information instead of disclosing and criticizing it, because the disclosure of celebrities' immoral behaviours might be harmful not only to these famous people and their relatives; but it could also create harms to society

[791] Wragg, (n 687) 318.
[792] Phillipson, (n 16) 158.
[793] Ibid. 159.

in general because the celebrities' fans like teenagers might also think to live such immoral experiences.[794]

Absolute privileges and public interest defences

There is a judicial ground to argue a strong consistency between absolute privileges in defamation and public interest defence in privacy. [795] For instance, in *White v Withers Llp and Another*, [796] the court of appeal rejected the appellant's claim of breach of confidence or misuse of private information in respect of the respondent's 'wrongful interference with property by possessing, taking or intercepting the claimant's correspondence and documents including personal family letters, private and confidential letters concerning business opportunities and documents containing financial information'. Ward LJ upheld the decision of first instance court that the communication of the appellant's private information between his former wife and her solicitors to be used in the litigation cannot be misused for the purpose of privacy invasion. [797] There is a public policy in immunizing statements made in respect of a litigation from any legal liability whether in defamation or privacy law. [798] The Supreme Court for instance, in *Khuja (formerly known as PNM) v Times Newspapers Ltd,* [799] rejected any attempt to strip the protection of freedom of expression under absolute privilege (of publication of a fair and accurate report of proceedings) in open court by granting an injunction based on privacy law. The main reason for this rejection relates to the coherence of the legal system in defamation and privacy rules. The coherence of law may require an equal application of absolute privileges whether in defamation or privacy law, because such

[794] Phillipson, (n 16) 155-7.
[795] Warby & Shore, (n 598) [11.67] 494.
[796] [2009] EWCA Civ 1122
[797] Ibid. [23 & 68].
[798] Warby & Shore, (n 598) 495.
[799] (n 320) [34] 3.

privileges reflect a public policy that should not be circumvented by bringing privacy proceedings. [800] On that understanding, it is logical to apply the defamation defence of absolute privileges in privacy law, because the public policy behind such privileges may be consistent with public interest exception that overrides the freedom of expression over any competing interest in privacy. However, English privacy law is under development, and its rules emerge from common law cases, future cases may bring to life the potential application of absolute privileges in privacy law. [801]

5. 4: Concluding remarks

This Chapter has explored the challenges of the overlap when applying the defences of defamation within privacy law, and the potential harmonisation between defamation and privacy defences. In order to map a clear picture of these challenges, the chapter has at the outset identified those main defences in defamation that could be applied in privacy law due to this overlap. These include truth, honest opinion, qualified privileges, absolute privileges and publication on matter of public interest. In parallel with this mapping, the chapter has also considered the defences of privacy such as public domain and public interest. This potentially precipitates an understanding of the differences between such defences; it also provides a basis for assessing the potential implications of applying the defences of defamation in privacy law due to their unavoidable overlap. A deep analysis from distributive justice and local coherence perspectives has been applied towards assessing those judicial receptive approaches which sought to transpose some of the defences applied within

[800] It is interesting to mention that the Supreme Court ruled that *no* reasonable expectation could be raised in respect of the information disclosed in open court proceedings. *Khuja,* (n 320) [34]; Warby & Shore, ibid. 495-6.
[801] The American Restatement (second) of Torts in § 652F equally allows applying absolute privileges in defamation and privacy law 'The rules on absolute privileges to publish defamatory matter in § § 583 to 592A apply to the publication of any matter that is an invasion of privacy'.

defamation tort into the territory of privacy tort based upon the previously elucidated tort overlap. In this respect, this thesis has examined the judicial receptivity of borrowing defences of qualified privileges and POMOPI from the defamation to privacy territory if both torts overlap. Distributive justice theory added a significant insight to the question of applicability of POMOPI defence in privacy cases since it examined the distribution of benefits and burdens of applying such defence that would change the standard of liability in privacy from strict liability to negligence. By applying fairness and loss spreading criteria, there would be undesirable outcomes towards disadvantaged groups in the society who become worse off because of the unfair distribution of burdens and benefits resulting from the application of POMOPI in privacy law. It is unfair to ask a group of individuals such as celebrities or women to bear the costs of the activities of the press that serve the benefit of society in general. Distributive justice via the fairness factor requires those who reap the benefits of press activities to bear their costs. This unfair distribution of costs and benefits should be taken into account in assessing the reasonableness of the publisher's belief that the publication of private information genuinely serves public interest (such as revealing details about a Nazi-themed party and the mockery of Holocaust victims). [802] Such belief should not be considered as reasonable because it would leave only the victims (such as Mosley and the other five female participants) bearing the negative consequences of the intrusive publication. The fairness demands that the public who benefit from such harmful activity should bear its costs as well as the publisher. The media who are the most powerful entities should be *strictly* liable because they are able to spread such costs on the public who reap the benefits of harmful publications of private information. If the burdens of harmful publications were borne only

[802] Campbell (n 105) at 117; Mosley (n 118) at 122.

by the victims instead of being spread across many participants, this would be an objectionable outcome from distributive justice. Distributive justice theory also takes the loss spreading as a criterion to assess the reasonableness of the defendant's conduct. The standard of liability in POMOPI defence focuses on loss-shifting rather loss-spreading because the costs of media intrusions were only carried by victims. This loss-shifting would be a crushing and debilitating effect on the individuals' autonomous choices and personality development since the costs of privacy invasion were exclusively borne by a specific participant rather than spread over the whole society. Based on this criterion, it would be unreasonable, as this thesis concluded, to leave only the victim to bear the costs of the media intrusive publications. Media as economically powerful entities occupy the strategic positions to spread the costs of harmful publications/damages in the fairest manner. The loss-spreading criterion may ensure the compensation of privacy harms without financially ruining the defendant (media) since the latter is able to distribute such financial losses over their business, and therefore indirectly towards a particular section of society invested in the media outlet – both of whom reap the benefits of media activities. From the local coherence perspective, there would be undesirable inconsistency if privacy law allowed the application of defences which initially require the defendant not to have malicious intent behind publishing the information. This means that the defendant must believe in the truth of the information to plead successfully the defences of honest opinion, qualified privileges and POMOPI. The undesirable inconsistency caused by applying such defences in privacy law derives from contradictorily bringing together the requirement of belief in truth alongside the fact that truth itself is not a defence in privacy.

Regarding the potential harmonisation between the defences of defamation and privacy law, this chapter has articulated how examination of the overlap potentially sheds

further light on the reliability of truth as a complete defence in English defamation law, given that reputation (a protected interest in defamation) constitutes part of the private life concept. In the latter case, this can be extrapolated from Strasbourg jurisprudence or from an examination of theoretical perspectives. This thesis concluded that the overlap between defamation and privacy strongly calls for harmonising certain defences such as truth/public interest, honest opinion/freedom to criticize to achieve a coherent protection to freedom of expression, if the reputation and privacy ought to be always protected under two independent and distinct causes of action. The harmonisation between such defences, attained by adding the element of public interest, would be a necessary and justified step to achieve a coherence between defamation and privacy since both torts should equally protect the freedom of expression guaranteed by Article 10 ECHR.

Chapter 6: The impact of the overlap on interim injunction rules

6. 1: Introduction

The impact of the overlap on interim injunction rules represents the fundamental challenge raised from such overlap. This relates to the longstanding rule of interim injunction applied in defamation law ruled in the historical judgment of Bonnard v Perryman in 1891. Keeping loyal to this historical authority represents a real challenge to adapt a unified rule concerning the applications of interim injunction in defamation and privacy law. The purpose of this chapter is to address the challenge of maintaining two (inconsistent) rules and identify the right applicable rule if defamation and privacy overlap. This chapter, therefore, explores defamation and privacy rules of interim injunction in the first section. In doing so, the chapter critically analyses the implications of applying defamation rule in the overlap and subsequently the consequences of applying privacy rule, as this thesis argues, in the overlapping cases.

6. 2: Interim injunction rules of defamation and privacy

In this section, I explain the concept of interim injunction. This is a essential prerequisite to understand the rules of interim injunction in defamation and privacy which are the tasks of the subsequent subsections.

A- Overview of interim injunction

According to the Senior Courts Act 1981, the court has jurisdiction to grant injunctive relief at the interlocutory stage if it is 'just and convenient to do so'. [803] The term of interim injunction refers to the restraining order in the introductory stage of judicial proceedings by

[803] S. 37(1) & (2) Senior Courts Act 1981.

which the harmful activities are suspended until the settlement of legal proceedings. [804] Such temporary order seeks to restrain initial harms that have not yet occurred or prevent further harms if the harmful activities had already occurred. The landmark case of *American Cyanamid Co v Ethicon Ltd* identified the governing principles to grant or refuse the applications of injunctive relief. [805] In this case, the claimant successfully sought an interlocutory injunction to restrain the defendant from infringing the applicant's right to a patent; but the defendant appealed to challenge the validity of the license. The court of Appeal rejected the injunctive relief for two reasons: firstly, there was no prima facia case of patent infringement, and secondly, the conflict of evidence is a matter for trial proceedings rather than at the introductory stage.

To grant an injunctive order, the court tests two matters; firstly, the seriousness of the litigious issue and whether it is frivolous or vexatious, and secondly, whether damages are an adequate or inadequate remedy to equally compensate the claimant and the defendant.[806] This means that no interim injunction should be granted if the damages awarded at trial were adequate to compensate the claimant' losses caused by the defendant (who must also be able to pay them). Such injunctive order, if granted, would necessarily curtail the defendant's competing rights unless the claimant has a real prospect to obtain a permanent injunction at trial. [807]

[804] *American Cyanamid Co v Ethicon Ltd* [1975] 2 WLR 316, [1975] AC 396, [1975] UKHL 1; The court may rarely grant a mandatory injunction ordering the defendant to take positive steps to protect the claimant's entitlement. Normann Witzleb, 'Equity does not act in vain: an analysis of futility arguments in claims for injunctions' (2010) 32 S. L. R. 503, 505.
[805] *American Cyanamid Co*. ibid. per Lord Diplock.
[806] Ibid.
[807] Deakin & al. (n 623) 876.

The nature of the litigants' rights is the main element in determining the adequacy or inadequacy of monetary remedy. However, the court should consider other factors to decide where the balance of convenience lies if damages might potentially be an inadequate remedy to each party. [808] The court must balance the disadvantages to each party who might succeed at trial and the extent to which monetary recovery is sufficient to compensate for the loss. The court considers the effects of an interlocutory injunction on defendant' interest(s) if any, and whether it would cause much higher inconvenience than merely a temporary delay of the defendant's course of action. [809]

An interim injunction has a significant role to play in the context of the defamation and privacy torts due to the sensitivity of competing interest of freedom of expression that would be significantly affected if an interlocutory injunction was easily granted. For example, the media (who are often the main defendants in cases of defamation and privacy) are unlikely to publish information due to the perishability of some information if this information was subject to a temporary order. [810] Furthermore, privacy and reputation as protected interests under such torts are dignitary interests, which could be unlikely restored only by an award of damages at trial if an interlocutory injunction avoided or denied.[811] The applications of an interlocutory injunction are subject to two rules in defamation and privacy torts, which might produce two inconsistent outcomes as explained in the next paragraphs.

[808] *American Cyanamid Co.* (n 811)
[809] Ibid.
[810] Sophie Matthiesson,'who's afraid of the limelight? The Trafigura and Terry super injunctions' (2010) 2 J. M. L. 153, 154.
[811] *Mosley,* (n 33) [209]; Reynolds, (n 603) per Lord Nicholls.

B- Interim injunction rule in defamation *(Bonnard v Perryman)*

English defamation law applies the defendant-friendly rule which makes the grant of interim injunction extremely difficult because of the principle of the landmark case *Bonnard v Perryman* the (B v P) test. [812] In this case, the Court of Appeal rejected the grant of an injunction that restrained further publications of plainly defamatory matters because such grant was unreasonable. [813] Lord Coleridge CJ, with whom the majority of Lords agreed, expressed his doubts on the ability of the court at the interlocutory stage to determine what should be done at trial unless it is exercised in clear cases. It is ruled that the matters of determining the meaning of words, the defence of justification and assessment of damages should be considered at trial proceedings, and each grant of injunctive relief would cause unreasonable interference with the jury function if such order was found to be unjustified. [814] The majority of Lords found that the judicial rejection of the defendant's willingness to justify the publication led to an early assessment of the defence, which represents an unjustified interference with the defendant' rights to freedom of expression if the jury had disagreed with the assessment. [815] Kay LJ disagreed with the majority, arguing that it is insufficient to rely upon the defendant's willingness to defend her publication to refuse an application of injunctive relief in defamation law. The judge should have discretion on granting injunctive relief if there was a strong plea of falsity because, as Kay LJ emphasised, there should be genuine grounds for any defence the defendant wants to advance at trial. [816] The Court of Appeal, however, unanimously agreed that the discretion of granting an injunction at the

[812] David Rolph, 'Bonnard v Perryman (1891)' in David Rolph (eds.), *Landmark Cases in Defamation Law* (Hart Publishing 2019) 27.
[813] *Bonnard v Perryman* [1891] 2 Ch 284 per Lord Coleridge CJ.
[814] Ibid.
[815] Ibid.
[816] His lordship upheld the grant of an interlocutory injunction because of the evidence of the falsity of statements complained of. *Bonnard,* (n 810) 288.

interlocutory stage should be highly strict, unless it is evident that no defence could be successfully established at trial. [817]

This means that the *(B v P) test* implies a possibility to grant an interlocutory injunction if the court found no defence at trial may succeed as applied in *Farrall v Kordowski.*[818] In this case, Tugendhat J granted an interim injunction prohibiting the defendant from publishing defamatory words on a website known as "solicitorsfromhell.co.uk". The judge found that no doubt could arise in respect of the defamatory meaning of the words complained of that adversely affect the applicant's business reputation as a competent solicitor. [819] The court justified such grant on two grounds: first, there was no indication from the defendant regarding any willingness to defend the words complained of. [820] Secondly, the applicant is likely to establish in the trial that such a publication should not be allowed because of its plain falsity. [821] The court considered the requirements of common law and the Human Rights Act 1998 before granting interim injunction because *the (B v P) test* rule represents only one side of the coin. Tugendhat J was convinced that the reputational harms might not be fully compensated by an award of damages. [822] In *ZAM v CFW and Anor,* [823] Tugendhat J also granted another interim injunction under defamation law. In this case, Tugendhat J allowed an interim injunction to protect the claimant's reputational interest that may be significantly tarnished in a way no damages could fully compensate it. [824] Furthermore, the defendant did

[817] Ibid.
[818] [2010] EWHC 2436 (QB)
[819] Ibid. [3 & 12].
[820] Ibid. [8].
[821] Ibid. [6 & 12].
[822] Ibid. [11-2]. The requirements of the interim injunction based on HRA 1998 will be discussed in detail in the next paragraph.
[823] [2011] EWHC 476 (QB) [23].
[824] Ibid. [24].

not state any intention to defend the libellous publications - if the defendant did state this, this could be an obstacle in ordering an interlocutory injunction as ruled in *the (B v P) test.* [825]

The restrictive approach of the interim injunction ruled in *the (B v P) test* was predicated upon three correlated rationales. The first rationale of the restrictive approach to granting an interim injunction is linked to the value of freedom of expression that should be exercised without impediment as long as the publication was not wrongful. [826] As we have seen in the previous chapter, truth is a complete defence in defamation and publishing true statements cannot defame a deserved reputation irrespective of such statements made with improper motives.[827] Defamation law provides freedom of expression significant protection through a variety of defences. [828] A prior restraint order in the interlocutory stage of defamation action might impose a chilling effect on freedom of expression if the defendant decided to establish the plea of justification (truth) which requires an in-depth examination at trial. [829] Since truth-finding is one of the primary justifications of free speech rights, expressing truth and commenting on it are essential aspects of freedom of expression that serves itself a genuine public interest.[830] Truth justification, however, is an irrelevant issue in the arena of privacy and it is not lawful to let the truth out if it is concerned with an individual's private life (unless such revelation serves a real public interest). [831] The plea of justification may require a reconsideration, not only because the interest of reputation is one of the

[825] Ibid.
[826] *Bonnard,* (n 810).
[827] *Holly v Smyth* [1998] QB 726.
[828] Martin H. Redish, 'the value of free speech, (1982) 130 university of Pennsylvania Law Review, 591, 640.
[829] *Greene v Associated Newspapers Ltd* [2004] EWCA Civ 1462 [78].
[830] *Fraser v Evans* [1968] F. No. 1896, 360-3; Kent Greenawalt, 'Free speech justifications' (1989) 89 Colum. L. Rev. 119, 130; Paul Wragg, 'Enhancing press freedom through greater privacy law: a UK perspective on an Australian privacy tort' (2014) 36 The Sydney Law Review 619, 638.
[831] Julian Petley, 'on privacy: from Mill to Mosley' in Julian Petley (eds.) Media and public shaming: Drawing the boundaries of disclosure, (I. B. Tauris 2013) 59.

aspects of private life rights protected under Article 8 ECHR; but also, because freedom of expression and private life rights should be treated equally. [832] The *(B v P)* test prioritises the public policy of speaking the truth over the competing interest of reputation. However, such a public policy regarding speaking the truth is decisively changed because speaking truth, as much as privacy law concerns, could be actionable if the disclosure serves no public interest.[833] The uncertainty of the claimant's interest in the interlocutory stage represents the second rationale of *the (B v P) test* rule. It is difficult to confirm or deny the violation of reputational interests until the trial decides where the truth lies through a close examining of the credibility of witnesses and documents. [834] These two rationales are traditionally and constitutionally reserved to the jury at trial. This reservation provides the third rationale to keep the *(B v P) test* rule, since the judge would breach the jury's right to decide whether the statements were defamatory or not, and whether the defendant can successfully establish one of the defences in defamation. [835] The second and third rationales were reaffirmed in *Greene v Associated Newspapers Ltd* which sought to challenge *the (B v P) test* rule in light of the Human Rights Act 1998 and the jurisprudence of the right to privacy in Article 8 ECHR.

In this case, the appellant challenged the refusal of a prior restraint application regarding an article declaring that a convicted criminal, Peter Foster, had a business relationship with the claimant. [836] The rejection of the injunctive application was based on the applicant's failure to satisfy the *(B v P)* test. [837] The appellant claimed that the likelihood test ruled by s. 12 (3) HRA 1998 represents a general test that should be applied in all cases

[832] See chapter 5: s. 2.
[833] Rolph, (n 819) 57.
[834] *Greene* (n 836*)* [57].
[835] Ibid. [57 & 76].
[836] Greene (n 836) [3-19].
[837] Ibid. [20-1].

including defamation actions. [838] Furthermore, the applicant submitted that *the (B v P) test* rule imposed an automatic priority to freedom of expression over reputation, and such imposition conflicts with the methodology ruled by House of Lords in *Campbell v MGN* [839] that imposes no automatic priority or presumption to one right over another. Furthermore, it was argued that the *(B v P)* test represented an incompatible rule with the Strasbourg jurisprudence, because it accords an inappropriate weight to the freedom of expression right over the reputation right. [840] However, the Court of Appeal found that the *(B v P)* rule may still be a good law since its protected interest of reputation is entirely different from the interest of confidentiality, which requires a flexible approach to grant an interim injunction. [841] The Court of Appeal also observed that an attentive reading of s. 12 HRA calls for an enhancement of the protection of freedom of expression, rather than restricting it. [842] The Court of Appeal also reaffirmed the rationale of *the (B v P)* rule based on the role of jury and trial proceedings. [843]

However, this thesis argues that the restrictive rule of the (B v P) test needs a reconsideration and a revisit in light of the domestic authorities and the Strasbourg jurisprudence concerning the relationship between the competing rights of Articles 8 and 10 ECHR. Despite the recognition of reputation within the protective scope of Article 8 ECHR, [844] the Court of Appeal failed to examine the practical effects of granting and refusing an interim injunction on the conflicting rights. Instead, it applied the restrictive test mechanically without assessing how damages can effectively vindicate the tarnished reputation, and it did

[838] Ibid. [25].
[839] Ibid. [27].
[840] Ibid. [26]
[841] Ibid. [60].
[842] Ibid. [61].
[843] Ibid. [57 & 78].
[844] Ibid. [68].

not evaluate the impact on freedom of expression if the injunctive relief had been granted.[845] This represents a failure to consider the comparative importance of values of rights in conflict, since the methodology implied in *the (B v P) test* would give freedom of expression precedence over the right to reputation. [846] The need for reconsideration of *the (B v P) test* on the basis that the methodology of Article 8 ECHR may be necessary and logical with the provision of s. 11 Defamation Act 2013, which removed the jury from defamation trials unless the court orders it. Thus, this is the time to revisit the restrictive rule of interim injunction in defamation law, since its rationales could not be any more reliable. Such a view might be strengthened with the fact that the (B v P) rule has never been considered in the highest Courts like the Supreme Court or the House of Lords. [847]

These anti-*Bonnard v Perryman* arguments have been recently endorsed in *Taveta Investments Ltd v FRC.* [848] In this case, Nicklin J refused an injunctive relief sought by Taveta against Financial Reporting Council (FRC) to stop the publication of 'sanction documents' which may be capable of being defamatory since the threatened publication implies criticisms against Taveta personnel. The rejection of such injunctive application was imperative, because the applicant did not meet the threshold of 'exceptional' required to grant an injunctive relief to restrain publication against a public body which the authorities impose a higher threshold to grant injunctions in public law than those applied in private law. [849] Nicklin J expressed his reservations in respect of the rationales of *the (B v P) test*. Firstly, the

[845] Witzleb, (n 35) 421; The factor of the adequacy of damages will be discussed in the next paragraph.
[846] *Re S,* (n 5) [17] Lord Steyn; Rolph, (n 819) 43; Godwin Busuttil and Patrick McCafferty, 'Interim Injunctions and the Overlap between Privacy and Libel' (2010) 2(1) Journal of Media Law 1, 9.
[847] David Eady, 'A public talk about how free speech should be protected in light of the European Convention of Human Rights' 10th March 2010 at City University, London. https://www.scribd.com/doc/28195800/Justice-Eady-Speech-City-University-London-March-201012
[848] *Taveta Investments Ltd v The Financial Reporting Council & Ors* [2018] EWHC 1662 [22].
[849] Ibid. [95, 99].

constitutional role of the jury is no more reliable to justify the survival of this rule, since a judge should resolve defamation proceedings unless it is ordered otherwise. [850] Secondly, the Strasbourg's jurisprudence gives equal weight for the rights as outlined in Articles 8 and 10 ECHR. In contrast, *the (B v P) test* presumes a priority for freedom of expression over the right to private life. [851] Based on this analysis, there is a solid ground to reconsider the reliability of the rationales behind the (B v P) test, since reputational interest involves aspects of human dignity and autonomy. David Eady J extra-judicially pointed out that public policy, which considers an award of damages in defamation as an adequate remedy, may play a crucial role in the survival of *the (B v P)* test. [852] This public policy, by contrast, provides a ground to adopt a flexible approach to grant injunctive relief in privacy law as will be discussed below.

C- Interim injunction rule in privacy (likelihood test)

In the pre- Human Rights Act 1998 period, granting or refusing an interim injunction application generally depended on the common law principles ruled in *American Cyanamid Co v Ethicon.* [853] Based on this authority, it was easy to obtain a temporary injunction to protect privacy value protected under the equitable action of breach of confidence, which was the most important action to protect privacy value before the recognition of misuse of private information tort in *Campbell v MGN.* [854] Based on the balance of convenience, it was likely to grant an interim injunction under the equitable action of confidence because confidentiality is like an ice cube - if gone an award of damages could never fully restore it. [855]

[850] Ibid. [97] ii.
[851] Ibid. [97] iii.
[852] Mr. Eady, (n 854).
[853] See the first paragraph of this section.
[854] Witzleb, (n 35) 412.
[855] *American Cyanamid Co* (n 811)

However, mere confidentiality cannot give a guarantee to obtain injunctive relief if the publication of such confidential information serves a genuine public interest. [856] This approach, nonetheless, represented a challenge to the exercise of freedom of expression if the grant of an interim injunction depends only on showing an arguable issue of confidentiality. [857] Such a pro-claimant test, therefore, provoked media hostility because some information is perishable commodities that could lose their value once postponed.

The Human Rights Act 1998 adopted a new approach that seeks to assuage and mitigate the chilling impact on the exercise of freedom of expression right based on the prior restraint guidelines ruled in *Cyanamid Co v Ethicon* authority. The HRA 1998 focused on the importance of freedom of expression, which should get a particular regard before granting any prior restraint order. [858] Section 12 (3) of HRA states that the grant of interim injunction should satisfy a higher threshold of the 'likelihood of success at trial' rather than the threshold of a 'serious question to be tried' as ruled in *American Cyanamid Co.* [859]

In *Cream Holdings Ltd v Banerjee,* [860] the House of Lords utilised the 'likelihood' test ruled in S. 12(3) HRA 1998. In this case, the court granted an interim injunction to the applicant against the disclosure of confidential information of corrupt business practices obtained by Banerjee, an ex-employee of accountability employed by the applicant, because

[856] In *Cambridge Nutrition Ltd v BBC* [1990] 3 A11 E.R. 523 (C.A.). The Court of Appeal found that the grant of injunctive relief was groundless because the balance of convenience requires the court to take into account the competing interests of both parties and assess the relative strength of both parties' claims. In this case, injunctive relief was granted prohibiting the BBC from disseminating a program that deals critically with Cambridge Nutrition low-calorie diet since the company agreed with BBC to postpone the publication of such a program. Lord Kerr rejected this basis to grant a prior restraint because the function of giving injunctive relief is to hold the balance as justly as possible in situations where a trial can only resolve the substantial issues between the parties. The Court of Appeal found there was a real public interest to inform the public an important matter of health, which was also a timely subject matter that damages can hardly compensate the national broadcaster.
[857] Richard Clayton & Hugh Tomlinson, *privacy and freedom of expression* (2001 OUP) at para. [15.18].
[858] S. 12 (4) HRA 1998.
[859] Witzleb, (n 35) 413.
[860] *Cream Holdings Ltd. & Ors v Banerjee & Anor* [2003] EWCA Civ 103 [51 & 54] per Lord J Simon Brown.

the threshold test of 'real prospect of success' at trial was convincingly established. In the Court of Appeal, the defendants contended that s. 12 (3) of HRA 1998 imposes a higher threshold than those applied in *American Cyanamid Co* guidelines, and no interim injunction should be issued unless the applicant is more likely than not to succeed at trial. This appeal was dismissed, since the defendants' interpretation of the likelihood test would give freedom of expression a higher rank over other competing interests. [861] The Court of Appeal upheld the grant of the injunctive relief that had been made on the threshold outlined in American Cyanamid of 'real prospect of success'.

The House of Lords, however, unanimously rejected such a grant since the banned disclosure involves a serious public interest; and the applicant was more likely to fail rather succeed at trial. [862] It is ruled that the court must equally accord appropriate weight to the competing convention rights in article 8 and 10 ECHR. [863] Lord Nicholls, with whom all other Lords agreed, identified the essential element based on which an interim order should be issued according to section 12 (3) HRA 1998. This element predicates upon the test of 'likelihood of success at trial' that requires the court to be satisfied that the prospects of success at trial are sufficiently favourable before ordering any interim injunction. [864] In other words, the likelihood test requires not only a successful expectation of privacy in respect of the subject matter of the application; but also requires no prospect of success of the defendant article 10 ECHR rights in the balancing test. [865] However, s. 12 (4) HRA 1998 indicates that the uncertainty in the applicant's prospects of success must be resolved in

[861] Ibid.
[862] *Cream Holdings Ltd,* (n 37) [25].
[863] *Cream Holdings Ltd*, (n 37) [23].
[864] Ibid. [22].
[865] Ibid. [23]; Witzleb, (n 35) 414.

favour of freedom of expression.[866] The particular regard on freedom of expression imposes on the court a duty to consider to what extent the materials in proceedings are in the public domain or public interest. [867] If the information has reached the public domain, the court should refuse to grant an injunction because such injunctive relief would be futile and helpless. [868] However, the development of English privacy law provided an exception to such a duty, because injunctive relief would be useful to prevent further intrusions into private life rights - even if the private information has reached a broad public domain.[869]

The role of damages in the defamation and privacy law plays a crucial role to keep the sustainability of the (conflicting) tests of injunctive relief. The restrictive approach of defamation law may find a justificatory basis in the effectiveness and adequacy of monetary remedy to compensate, restore and vindicate the tarnished reputation interest. [870] In contrast, it would be impossible to reach a similar outcome if privacy had been wrongfully breached because personal information may not be restored to its previous position by such an award. [871] This premise, however, may be doubted if recent judicial and academic views on the role of damages awarded in defamation and privacy were considered. The fact that both values of privacy and reputation are derived from Article 8 ECHR may bring into question the soundness of the role of damages argument to justify the tests used in obtaining an interim injunction. The adequacy of damages to compensate for the loss of reputation should

[866] Andrew Scott, 'Prior notification in privacy cases: A reply to Professor Phillipson' (2010) 2 J. M. L. 49, 54.
[867] S. 12 (4) a & b HRA 1998.
[868] In Mosley, (n 33) [32] Eady J declined an injunction to restrain the publication of private information and video materials on the defendant's website since the private materials were available on other sites and viewed multi-thousands of times as well; Witzleb, ibid. 412; Witzleb, (n 811).
[869] In PJS, (n 154) the Supreme Court emphasised on the importance of interim injunction relief restraining an initial or further unauthorised publication of private information because there would be a difference between confidentiality (secrecy) and intrusion into private life. In the former scenario, an interim injunction will lose its purpose if such details were publicly available; whereas such order would still be useful to prevent further intrusions into private life right.
[870] *Green* (n 836) [78]; *LNS, (n 28)* [149] ii.
[871] *Mosley* (n33) [231].

not be a reason to refuse injunctive relief, because the interests of reputation and privacy are inextricably linked. [872]

This would require a reconsideration of the judicial view expressed by Eady J in *Mosely v MGN* about the difference between defamation and privacy, because it is not evident that damages can restore completely and effectively the tarnished reputation. It is suggested that the differentiation between defamation and privacy law upon the role of damages might be overstated, because reputation and privacy harms are ineradicable by an award of damages.[873] The inadequacy of monetary award in defamation was used in many cases to support the decision of granting injunctive relief. [874]

The role of damages in privacy is also a debatable matter because harms of privacy law and negligence law may similarly be ineradicable since damages can never restore the protected interests such as physical integrity in negligence law to their previous positions. [875]. In other words, despite the inability of damages to restore an individual's physical integrity lost because of negligent conduct, it is undebatable that monetary awards are the most effective remedy in negligence law; and privacy, therefore, should be similarly treated. It may be right that an award of damages given their particular nature cannot restore privacy and physical integrity. Avoiding harms would be the best option, not only in privacy, but in all other torts; injunctive relief cannot be possible in negligence law because it is hard to assume and prevent negligent harms. Arguably, the existence of the tort of privacy is to tell us not to

[872] *GYH v Persons Unknown* [2017] EWHC 3360 (QB) [39].
[873] David Rolph, 'vindicating reputation and privacy' in Andrew T. Kenyon (eds) *Comparative defamation and privacy law* (CUP 2016) 295-9.
[874] *Farrall* (n 818) [11-12]; *ZAM,* (n 830) at 24. The judge found the interim injunction would be equally granted based on Bonnard v Perryman test or likelihood test [24-26]. The judge also found a motivation of blackmail in publishing the information, which weakens the claim of freedom of expression.
[875] Scott, (n 873) 56.

behave in a particular way whereas negligence is about setting standards. This is why monetary relief represents the unique option in negligence law. [876] However, English privacy law seems also incoherent in respect to the inadequacy of damages to remedy privacy invasions. [877] In *Spelman v Express Newspapers,* for instance, Tugendhat J decided that damages could never be an effective remedy if privacy is based on a secret, because once a secret is discovered, it can never be covered-up; however such damages can be an effective remedy to assuage hurting feelings caused by wrongful intrusions into private life. [878] In *PJS v News Group Newspapers Ltd,* however, Lord Mance implicitly rejected the Tugendhat J approach in *Spelman v Express Newspapers*, because an award of substantial or even exemplary damages can never adequately remedy losses caused by a disclosure of highly private information. [879] The Supreme Court found an interim injunction has a significant role to prevent further wrongful intrusions into private life regardless to what extent the private information was out in the public domain. [880] However, Lord Toulson, who disagreed with the majority of Lords, said that it would be principally wrong to grant an injunctive relief on the basis of inadequacy of damages even though it could be right to refuse such injunction on the basis of the adequacy of damages. [881]

[876] Kirsty Hughes,' Privacy Injunctions: No Obligation to Notify Pre-Publication' (2011) 3(2) Journal of Media Law 179, 186; Rolph, ibid.
[877] Scott, ibid. 52-4.
[878] Ibid. [111]; in *YXB v TNO* [2015] EWHC 826 (QB) Wardy J also followed the same approach because of 1- the claimant's failure to respond positively to his duty of full and frank disclosure of materials to the court. 2- The fact that the sexual relationship between the consented parties was only a single act and did not involve other forms of intimacy. 3- The claimant's attitude towards his privacy claim did not indicate any kind of personal distress resulted from the disclosure; this has been reaffirmed by the absence of any personal witness to the court and the intervention of his solicitors on his behalf. 4- The court was convinced that protecting the claimant' commercial interests was the real motive to apply a prior restraint application.
[879] (n 154) [43].
[880] Ibid. [54 & 71].
[881] Ibid. [92].

The inadequacy of damages should not be a *carte blanche* to allow an interim injunction; rather it should be an incentive to grant a prior restraint if the claimant is more likely than not to establish at trial disallowance of publication in the suit. This view seems to be convincing and logical, since the first main factor to grant or refuse injunctive relief is whether the applicant can successfully pass the likelihood test in s. 12 (3) HRA 1998. Then the court turns to the factor of the adequacy of damages before moving to the balance of convenience. [882] The importance of the interim injunction in privacy is linked to the further and memorable intrusions into private life caused by the judicial proceeding itself. Trial proceedings in privacy cases may expose victims to further intrusions into their private life, and they may consequently augment their distress and embarrassment. Moreover, an interim injunction might represent a lesser challenge to the freedom of expression, because the prior restraint order cannot do more than a temporary delay of the publication. Therefore, the defendant would be able to publish the restrained information if the court at trial found such an injunction was unjustified. [883]

The claimant in pure defamation cases, however, seeks to obtain a remedy through such public proceedings, which declare a public finding of the falsity of defamatory allegations. [884] Such a difference is one of the relevant elements that make an interim injunction the most effective remedy in privacy, since even successful trials cannot erase private materials from the public' memories, but it might help to keep such information memorable forever as the case of Mosley. [885] This fact might make a refusal of injunctive relief

[882] *Cream Holdings Ltd.* (n 37) [63].
[883] Gavin Phillipson & Helen Fenwick, 'Breach of Confidence as a Privacy Remedy in the Human Rights Act Era' (2000) 63 The Modern Law Review 660, 692.
[884] Gavin Phillipson, 'Max Mosley goes to Strasbourg: Article 8, Claimant Notification and interim injunction' (2009) 1 J. M. L. 73, 74.
[885] *Mosley* (n 33) [230];

amounted to a final decision from the applicant's point of view because the continuation of judicial proceedings would be futile and harmful. [886] Therefore, the distinction between the tests of interim injunction in the defamation and privacy, based on the adequacy or inadequacy of damages, may lose its justificatory weight since the values underneath the protected interests of privacy and reputation are identical. Damages are a significantly inadequate remedy if the publication in suit adversely touches the individual's dignity and autonomy. Privacy and personal reputation may share roots in dignity and autonomy values in a way that the violations of privacy or reputation interests may cause a devastating effect on the reputational interest, similarly how an adverse effect on private life can be caused by defaming personal reputation. [887] If this is correct, it would be unjustified to refuse granting an interim injunction based on the adequacy of damages if reputation interest is linked to personal character, since dignity and autonomy values are primarily engaged in cases of personal defamation. [888]

6. 3: The impact of the overlap on the application of the interim injunction

In this section, I outline the judicial approaches regarding the application of temporary order in cases that equally involve defamation and privacy torts. I identify and critically examine the scenarios in which the overlap between libel and privacy becomes problematic. This thesis argues that prioritising *the (B v P) test* over likelihood test in the overlapping cases may cause undesirable consequences, whereas applying the likelihood test in such cases may

[886] Privacy and press freedom (Blackstone Press 1995) 156 cited in Phillipson, ibid. 75.
[887] Cheer, (n 15) 318; The Leveson inquiry into the culture practices and ethics of the press: witness statement of Max Mosley/2011 para. https://webarchive.nationalarchives.gov.uk/20140122165317/http://www.levesoninquiry.org.uk/wp-content/uploads/2011/11/Witness-Statement-of-Max-Mosley.pdf
[888] Tugendhat J differentiates between personal and professional defamation. *Thornton,* (n 63) [33].

achieve desirable outcomes from the coherence, efficiency and feminist analysis perspectives.

A- Critical Analysis of English judicial approaches towards the application of *Bonnard v Perryman* in the overlap between defamation and privacy.

The restriction of the *(B v P)* test, and the flexibility of likelihoods test are not definitively conclusive because the restrictive rule of defamation law may provide the applicant with a grant of the interim injunction if it is clear to the court that no defence would succeed at trial. Similarly, the flexible rule used in privacy may provide the applicant with a refusal of temporary order if the court identifies a genuine public interest in publishing the information. [889] These different tests, therefore, may produce consistent outcomes because there could equally be a grant or a refusal of an interim injunction under both rules in defamation and privacy. [890] In such a scenario, the overlap between defamation and privacy would be unproblematic because the outcomes would not be different, whether under a defamation or a privacy rule. The truth and falsity of the information in suit may have strong relevance in the question of an interim injunction and the applicable rule in the overlap between defamation and privacy. If the private and defamatory information were definitively false, there could be no inconsistency or tension between the rules of interim injunction since an interlocutory order may be granted under each test. For instance, In *LJY v Persons Unknown,* [891] the applicant, a well-known person, working in the entertainment business, obtained an interim injunction to prohibit the disclosure of false allegations of criminal activities. [892] The court found the present case had involved a clear blackmail attempt to gain

[889] Mr. Eady, (n 847) 12.
[890] *ZAM* (n 830) [24-6]; LNS (n 28) [123-5].
[891] [2017] EWHC 3230 (QB)
[892] Ibid. [1 &16].

financial profits. [893] The injunctive application has relied on three causes of action: misuse of private information, defamation and tort of harassment. [894] In regard of MOPI, the court was satisfied that the applicant meets the threshold required by s. 12 (3) since such allegations fall within the protective scope of private life in Article 8 ECHR. [895] Besides, the improper motive of blackmail has weakened the potential claim of freedom of expression and made further justification of prior restraint order. [896] The restrictions of *the (B v P) test* may not prevent the grant because the allegations were definitively false and irreparable by damages: [897]

> 'The allegation is likely to cause serious harm to the claimant's reputation, and damages could not be an adequate remedy. There is nothing in the material before me to indicate any sufficient basis for a defence of truth or public interest'.

In *GYH v Persons Unknown*, Warby J, granted another interim injunction on the same basis applied in *LJY v Persons Unknown*. [898] His Honour found no tension between the defamation and privacy rules in respect of granting an interim injunction to restrain false, private and defamatory information. The applicant has provided the court credible and contradicted evidence to prove the falsehood of threatened allegations related to the applicant's sexual health. The court granted an injunctive relief under privacy rule since the falsity could undermine the public interest, if any, justifying the distribution of this kind of information. [899] Warby J also examined the application from defamation law since the

[893] ibid [12].
[894] Ibid. [25].
[895] Ibid. [27].
[896] Ibid. [29].
[897] Ibid. [44].
[898] (n 879).
[899] Ibid. [36].

allegations in question may adversely affect the applicant's commercial reputation. The court concluded that the prior restraint order is justified given no defence in defamation may succeed at trial. [900]

The real tension between these two tests starts with the scenario of private and defamatory information that either the claimant makes no declaration about the truth or falsity of the information or the defendant pleads its truth. Under the likelihood test, there might be a grant of injunctive relief order if the court found no public interest in such publication, whereas no prior restraint order may issue under *the (B v P) test*. The privacy test, therefore, would create an incentive to dress up a truly defamation claim in privacy frame to attract the more favourable test for obtaining injunctive relief. To solve this problem, English courts have used objective and subjective criteria to determine the right applicable rule of an interim injunction. The objective test seeks to examine the genuine nature of a privacy claim, if the subject matter of information were not private but only defamatory, there would be no overlap between defamation and privacy since such information should not truly engage privacy rights. The applicant's attempt to avoid the restrictive rule of defamation was an abuse of process because she seeks to prevent the defendant from the legal protection of her rights by circumventing the provisions of defamation. [901]

The term of abuse of process refers to unlimited circumstances where the litigant unfairly misuses the judicial procedures against the other party of litigation; or if such misuse adversely affects the administration of justice.[902] The courts have used an objective test to decide the real nub of the applicant's claim, whether it was truly private information or

[900] GYH (n 879) [37].
[901] Witzleb, (n 35) 430.
[902] *Hunter v Chief Constable of the West Midlands Police & Ors* [1981] UKHL 13 per Lord Diplock.

defamatory information in disguise. In *Tillery Valley Foods Ltd v Channel Four Television Corpn and Another*, Mann J applied an objective test to determine the gist of the interim injunction application. [903] The applicant, a food manufacturing company, sought injunctive relief to restrain the broadcast of the program containing confidential information appeared in secret footages showing many examples of unhygienic practices. The purpose of such an injunction, as the applicant claimed, was to have adequate opportunity to check the footage and make appropriate comments. Mann J refused the application since its real subject matter was not the confidentiality; rather, the real basis of the claim was to protect the applicant's reputation. [904] The judge found the alleged confidentiality was a disguised claim of defamation and the purpose of such dressing up was to get around the restrictive test of *the (B v P) test.* The applicant's choice of confidentiality is, in fact, an abuse of process since there was no basis of confidential quality in that information in the first place: [905]

> 'This is a defamation action in disguise. It is not surprising that it cannot be squashed into the law of confidence. And even if it could, since the reality would still be that of a defamation action with parallel claims based on other wrongs, it would have been appropriate to apply the rule in *Bonnard v Perryman* to any claim for an interlocutory injunction'.

The reason for giving priority to defamation rules is to protect the freedom of expression from the attempt of circumvention. However, this approach could not be supported in light of the domestic authorities and the Strasbourg jurisprudence. Firstly, the common law authorities admitted that the claimant is freely entitled to choose any cause of

[903] [2004] EWHC 1075 (Ch)
[904] Ibid. [21].
[905] Ibid.

action other than defamation in order to use the most advantageous rules available in the alternative action. In *Joyce v Sengupta,* the defendant argued that an abuse of process had been committed since the claimant had pursued under malicious falsehood action instead of a defamation action to get benefits from legal aid available in the former. [906] Sir Donald Nicholls explained this principle in the following paragraph: [907]

> 'English law has marked out causes of action on which plaintiffs may rely. Many causes of action overlap……. When more than one cause of action is available to him, a plaintiff may choose which he will pursue. Usually, he pursues all possible causes of action, but he is not obliged to do so. He may pursue one to the exclusion of another, even though a defence available in one cause of action is not available in another. Indeed, the availability of defence in one cause of action but not another may be the very reason why a plaintiff eschews the one and prefers the other. …. I have never heard it suggested before that a plaintiff is not entitled to proceed in this way, and take full advantage of the various remedies English law provides for the wrong of which he complains. I have never heard it suggested that he must pursue the most appropriate remedy, and if he does not do so, he is at risk of having his proceedings struck out as a misuse of the court's procedures. In my view, those suggestions are as unfounded as they are novel'.

Secondly, the implicit priority given to the freedom of expression right in this approach would be inconsistent with the jurisprudence of Article 8 and 10 ECHR because the Strasbourg Court emphasises that the rights of the European Convention should be equally treated. [908] This approach would also be contrary to the English domestic authorities since the right to

[906] *Joyce,* (n 559)
[907] Ibid.
[908] *Mosley,* (n 481) [58]

freedom of expression would have an automatic precedence over privacy without any intensive focus on the importance of parallel rights in conflict. [909] The objective test, however, may be unhelpful if the information is objectively defamatory and private. English courts have used a subjective test to determine the real nub of the claimant's action since the objective test would be illogical if both claims of defamation and privacy were substantively engaged. The importance of the nub approach, as many scholars argue, is to close doors of circumventing binding authorities by merely framing the claim in misuse of private information instead of defamation. [910] In such cases, the overlap between defamation and privacy is acute because the information in the suit is equally private and defamatory.

In *Browne v Associated Newspapers Ltd,* Eady J challenged the *Joyce v Sengupta* authority and refused to consider the claimant's choice of action as the main factor to determine the applicable rule of interim injunction. [911]Even though an injunctive relief had been granted on the basis of likelihood test in s. 12 (3) HRA 1998, Eady J gave priority to the *(B v P) test* over the likelihood test if the information were defamatory, and the defendant decided to defend the publication under defences in defamation. The reason for such priority, as Eady J elaborated, was related to the policy underlying the restrictive test in defamation, which should not be circumvented by the claimant's choice. [912]. Such an approach takes into account the historical development of defamation law and its longstanding rule of *the (B v P) test* that should not be restricted by the development of privacy rules. [913] This approach, however, would not only be inconsistent with the claimant's freedom to choose the most suitable cause of action to protect her rights; but it would also be illogical because the

[909] *Re S* (n 5) [17] per Lord Steyn.
[910] Matthiesson, (n 817) 165.
[911] [2007] EWHC 202 (QB) [51 & 60].
[912] Ibid. [28].
[913] Rolph, (n 352)

applicant to restrain only private information would be in a better-off position than if she wants to restrain the disclosure of private and defamatory information.

The applicable rule of interim injunction in cases involving equally private and defamatory information was determined on the basis of the *defendant's* decision to defend the publication in the suit. The subjective test could also depend on the *claimant's* motivation behind the application of the interim injunction. This approach was applied in *Terry (previously LNS) v Persons Unknown* when Tugendhat J identified that protecting the applicant's commercial reputation was the real nub of super-injunction application. [914] In this case**,** the judicial rejection of Terry's application was reasoned under privacy and defamation rules. Based on the privacy, Tugendhat J was unsatisfied that the applicant may successfully establish that he is more likely than not to succeed at trial Art. 12(3) HRA due to the public interest justifying the potential intrusion into the applicant's private life. [915]

This reasoning, however, amounted to guesswork because the court might be unable to evaluate reasonably the free speech claim with the fact that no respondent had been notified.[916] Moreover, the concept of *potential* public interest might be an easier threshold given it would be easy for media to argue that there would be a potential public interest in every publication. Rather, there should be, as Wragg rightly observes, a real public interest outweighing privacy claim. [917] Tugendhat J was convinced that the restrictive test of *the (B v P) test* should be applied in this case because the applicant's real claim was a defamation

[914] *LNS,* (n 28); This approach has been also applied in *Viagogo Ltd v Myles &* Others [2012] EWHC 433 (Ch) [81]; *Shakil Khan (formerly JMO) v Tanweer Khan (formerly KTA)* [2018] EWHC 241 (QB) [71-2]; such approach has also been endorsed in the northern Ireland jurisdiction as applied in *Cushnahan v BBC & Another* [2017] NIQB 30.
[915] *LNS,* ibid. [125].
[916] Wragg, (n 687) 306.
[917] Ibid. 305

claim dressed up in misuse of private information. [918] The judge was also certain that the defendant would have a successful defence to plead at trial, if libel action had been brought.[919] The applicant' powerful personality and the applicant's failure to mention the potential distress caused by the threatened intrusion had reinforced the judge's view that the claim's nub was to protect his reputation. [920] If this was right, *the (B v P) test* precludes granting an interlocutory order because of the potential success to defend the publication at trial and the adequacy of damages to compensate effectively and adequately the harmed party. [921] Such a conclusion, however, could arguably be illogical because the mere fact of applying an injunction may indicate, whether implicitly or explicitly, the potentially troublesome and distress that may result from the threatening intrusion into his private life. [922] Secondly, there could be truly exaggeration when Tugendhat J interpreted the absence of the applicant at trial to be an indicator of a hidden motivation exists underneath the proceedings of privacy claim, which presupposes, as Tugendhat viewed, the presence of potential victims who have concerns about their dignity and autonomy values. [923]

One may argue that the absence of victims could be justified in this case since the mere presence of victims, a super football player like John Terry and a model like Vanessa Perroncel, could shed intense light on their private life and provide media with an excellent incentive to discover the reason of such presence. Furthermore, their presence might be

[918] *LNS,* (n 28) [95, 149]
[919] Ibid. [123].
[920] Ibid. [95]
[921] Ibid. [149].
[922] Wragg, (n 687) 306.
[923] The presence of Terry's business partners and their role in collecting legal pieces of evidence have further supported Tugendhat J's view that the applicant's commercial reputation was the real gist of the injunctive relief. *LNS,* ibid. [33 & 66].

inconsistent with the application of super-injunction itself since the applicant sought to restrain any threatening publications concerning their secret relationship.

The impracticality, uncertainty and unpredictability are the main concerns raised from the nub approach since it gives the priority of *the (B v P) test* over likelihood test in overlapping cases. The nub approach is impractical since it is hard to identify the nub of the claimant's action when the separating line between private life and reputation is highly indeterminable.[924] Such an approach would make judicial decisions like guesswork since reputational issues may likely arise from most of the publications on private matters. For instance, an element of reputation may exist in each privacy action, especially in cases of public figures who may lose legal protection of their private life if the court applies the nub approach. [925] Furthermore, the concept of commercial reputation, which Tugendhat J identified as the nub of Terry claim, may be an integral part of private life as ruled in *GYH v Persons Unknown.* [926]

In this case, Mr Justice Warby granted an interim injunction based on harassment and misuse of private information. The non-disclosure orders temporarily prohibited the publication of sexual, physical and mental health information concerning a female sex-worker. [927] Warby J found the false information related to sexual conduct and sexual health may not only affect an individual's privacy and reputation interests, but such harms are also irreparable by an award of damages. [928] The court made a logical remark that, as this thesis agrees with, a reputational element should not undermine the private character of

[924] Barendt, (n 310) 87; Witzleb, (n 35); Cheer, (n 15) 313.
[925] Cheer, (n 15).
[926] (n 879)
[927] Ibid. [38].
[928] Ibid. [39].

information; instead, it could strengthen it by adding another factor to support the inadequacy of money to compensate the harms in overlapping cases.

The nub approach could also increase the uncertainty and consequently, the unpredictability of the judicial decision because such a task would be practically tricky with the conceptual overlap between dignitary interests of privacy and reputation. [929] This provides a strong impetus to adopt a unified approach to obtain an interim injunction that considers the dignitary interests of reputation and privacy equally with the countervailing right of freedom of expression. [930] This thesis argues that the likelihood test may achieve such a goal not only because it takes into account the considerations of rights in conflict; but also, because it could find a convincing support within the local coherence, efficiency and feminist analysis perspectives.

B- The supportive arguments of applying the likelihood test in the overlap between defamation and privacy

Against the judicial approaches, previously analysed, which prioritise the application of *the (B v P) test* in the overlap between defamation and privacy, it is argued that the application of likelihood test ruled by s. 12 (3) HRA 1998 in the overlapping cases may increase the practicality, certainty and predictability of judicial outcomes since the conflicting considerations of Articles 8 and 10 ECHR are equally engaged under this test. [931] The likelihood test may provide the claimant and the defendant an equal opportunity to protect effectively their interests since granting or rejecting an interlocutory injunction could be fairly considered. This test, practically speaking, takes into consideration the fact that privacy and

[929] Witzleb, (n 35) 437-8.
[930] Rolph, (n 13) 473.
[931] Witzleb, ibid. 434-8.

reputation interests may be inseparably breached concerning the unauthorised publication of voluntary, discreditable and private information, and cannot be restored and vindicated by a monetary award. [932] The likelihood test would also prevent uncertainty and increase predictability because there would be no need to decide what is the nub of the claimant's application whether to protect privacy or reputation; this task becomes elusive with the fact of substantive overlap between the concepts of privacy and reputation. [933] While this thesis agrees with applying the likelihood test in the overlapping cases due to its desirable outcomes previously outlined, this thesis advances other supportive arguments emphasising on the desirable consequences of applying likelihood test from local coherence, efficiency and feminist analysis perspectives.

The Coherence perspective

The underlying claim of coherence in law refers to the absence of contradiction or inconsistency between legal rules, which belong to the same branch of law on the same set of facts. [934] The regulations of contacts can explain a simple example of a contradiction in legal rules. If the law prohibits a particular kind of contracts, any consensual undertakings under such agreements should be unenforceable even though the law imposes a general rule that 'parties to contracts shall perform those contracts'. There will be an apparent contradiction between legal provisions if the law requires people to perform the undertakings of enforceable contracts. [935] The nub of the claim that priorities *the (B v P) test* over likelihood test could be objectionable from local coherence lens since the fundamental justifications of the *(B v P)* test are objectionably inconsistent and contradictory with the justifications of

[932] Witzleb, (n 35) 437.
[933] Ibid. 438.
[934] Ross B. Grantham & Darryn Jensen, 'Coherence in the Age of Statute' (2016) 42 Monash University Law Review 360, 363.
[935] Ibid.

privacy protection in the first place. The contradiction between *the (B v P) test* rule and privacy law is attributed to the role of truth that is the primary rationale of restricting the applications of interim injunction in defamation because it is non-wrongfulness to speak the truth. [936] By contrast, privacy law protects private information, regardless of whether it is true or false, from unauthorised dissemination unless there is a real contribution to a debate of public interest. [937] If truth itself cannot be a defence in privacy since it is inconsistent with the protection of privacy, [938] how we can apply *the (B v P) test* rule, which depends mainly on truth defence, in privacy law? It would be inconsistent and contradictory if the law allows using a test which brings its justification from the principle of truth, whereas truth itself has no role in the law to privacy in the first place.

One could argue that the reason of applying *the (B v P) test* rule in the overlapping cases is the willingness of claimant to protect indirectly her reputation via privacy proceedings in order to circumvent the restrictive rule of interim injunction. Such a question may be answered via common law authorities and Strasbourg jurisprudence of privacy, which recognise reputation within the scope of privacy. In *Khuja (Previously PNM) v Times Newspapers Ltd*, The Supreme Court found the broad scope of privacy may provide an alternative means to protect the right to reputation even though it is the primary function of the law of defamation. [939] In this case, Tugendhat J refused to grant injunctive relief to prohibit the defendant from identifying the applicant's police investigations in the report of criminal proceedings made in open court, even though the applicant was released without charge in

[936] *Bonnard,* (n 810) 284; Eric Descheemaeker, 'Truth and truthfulness in the law of defamation' in Anne-Sophie Hulin, Robert Leckey and Lionel Smith (eds), Les apparences en droit civil (Montreal 2015), 13-48.
[937] *Campbell,* (n 5); *Mckennitt* (n 12) [79]; GYH (882) [36].
[938] Eric Descheemaeker, 'A Man of Bad Character Has Not So Much to Lose': Truth as a Defence in the South African Law of Defamation' (2011) 128 South African Law Journal, 452.
[939] (n 320) [21] per Lord Sumption.

respect of the accusations of serious sexual abuses against children for which he had been arrested. [940] The injunctive application has relied on the misuse of private information to protect reputation, private and family life rights recognised by Article 8 ECHR. [941]

The rejection of such injunction was due to judicial belief that the applicant was unlikely to succeed at trial because there would be a serious public interest to know such proceedings and the administration of justice.[942] Furthermore, Tugendhat J also found that the continuation of previous injunction might only provide the applicant and his family, if any, a little benefit incomparable with the benefits of the public to know the fact of the applicant's arrest. [943] The Court of appeal upheld Tugendhat J judgement in the first instance and rejected the appellant 's argument that the identity of people under arrest or suspicion should be kept secret since the considerations of presumption of innocence as a matter of public policy do override the public interest considerations in open court. [944] However, the Court of Appeal ordered to keep the anonymity of the applicant and the injunction made under s. 4 (2) of the Contempt of Court Act 1981 until the determination of the application for permission to appeal to the Supreme Court. [945]

The Supreme Court upheld the conclusion of Tugendhat J because there would be difficult to justify any restrictions on the reporting of proceedings in open court. [946] The Court also revoked the anonymity order made under s. 4 (2) of the Contempt Court Act 1981. [947]

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[940] *Khuja (Previously PNM) v Times Newspapers Ltd* [2013] EWHC 3177 (QB)
[941] Ibid. [37 & 74].
[942] Ibid. [83].
[943] Ibid. [79].
[944] *PNM v Times Newspapers Ltd and Ors* [2014] EWCA Civ 1132 [37], [38] Lady Justice Sharp reasoned her rejection as it is well settled that most the pubic differentiates between being arrested and being convicted of criminal acts
[945] *PNM*, ibid [47].
[946] *Khuja v Times Newspapers Ltd* [2017] UKSC 49 [35].
[947] Ibid. [36].

However, the majority of Lords found that the failure of the application of injunction under privacy law caused by the absence of any reasonable expectation of privacy in respect of the matters discussed at a public trial. [948] This was the reason to conclude that the real motivation of the applicant is to protect his reputation at the first place even though the Supreme Court did not ignore the possibility of reputational loss to make an indirectly adverse impact of the applicant's private life. [949] Lord Sumption, with whom the majority of Lords agree, distinguished between two scenarios that involve privacy and reputation issues. Firstly, if the subject matter of claim genuinely engages a reasonable expectation of privacy, there would be no objection to protect reputational issue under privacy since its ambit is wider to the extent that may provide an alternative means to protect the right of reputation, principally protected by defamation law, from harmful publications. [950] Secondly, if the subject matter of claim concerns mainly the protection of reputation that has a collateral impact on private life indirectly, defamation restrictions must be applied, and no injunction should be issued in case of pleading justification based on the (B v P) test rule. [951] The defence of absolute privilege of a fair and accurate report of judicial proceedings may provide a strong reason to reject the injunctive relief because 'it would be *incoherent* for the law to refuse an injunction to prevent direct damage to PNM's reputation, while granting it to prevent the collateral impact on his family life in precisely the same circumstances'. [952]

Based on this authority, one may argue that the privacy rule of the interim injunction should be applied if the privacy claim was genuinely engaged regardless of whether reputational issues were collaterally raised in such a claim. The coherence of privacy law may

[948] Ibid. [34] (1).
[949] Ibid. [34] (2).
[950] Ibid. [21].
[951] Ibid, [19].
[952] *Khuja* (n 953) [34] (3).

provide further support to apply the general test of likelihood in s. 12 (3) HRA 1998 if the applicant has a reasonable expectation of privacy in respect of the materials in suit irrespective such materials are also defamatory. This approach rightly challenges the nub approach because the protection of reputation within privacy must not cause the disregard of privacy rights since the concepts of privacy and reputation may substantively overlap. Furthermore, Strasbourg jurisprudence may also strengthen the approach of the Supreme Court in *Khuja v Times Newspapers Ltd*. *the (B v P) test* rule may be incoherent with Strasbourg jurisprudence of the article 8 ECHR since it gives priority to the protection of freedom of expression in article 10 over private life in article 8 ECHR. The restrictive rule in defamation law may deprive the victims of adequate protection to their private life rights for the sake of freedom of expression simply because the information in suit was private and defamatory. [953] The incoherence would be acute with the fact that reputation interest is one of the protected aspects in article 8 ECHR. [954] The fact that privacy is the core value explicitly protected in Article 8 ECHR, may provide a reason to prioritise privacy rules over reputation implicitly protected under this article. [955]

The mere engagement of article 8 ECHR may require the court to accord an intensive focus of the important values inherent in such right. The likelihood test in s, 12 (3) HRA may provide the right methodology that takes into account both sides of rights in conflict to achieve a proportionate balance between private life and freedom of expression rights. The likelihood test may provide an appropriate assessment of the strength of not only the claim of freedom of expression, but also the claim of privacy. However, the preference of applying

[953] Ibid. 429.
[954] See chapter 2.
[955] Reputational harms may engage article 8 ECHR if the subject matter of publication was defamatory and private, or if the subject matter is seriously defamatory, that affects the victim's private life significantly. Witzelb, (n 35) 427-9.

likelihood test over the (B v P) test in the overlapping cases should not necessarily provide the courts with a free licence to grant prior restraint orders. The court should consider the probability to succeed in trial equally from the applicant or the defendant sides since no interim injunction should be granted if its subject matter contributes to a debate of genuine public interest. [956]

The Efficiency perspective

The erroneous outcomes of actions are not only objectionable since the courts had failed to give effect to the goals of substantive law, but it would also be objectionable from the economic analysis perspective because such results may inefficiently increase the social costs of judicial activities. [957] Richard Posner argues that the economic analysis of civil procedure system seeks to minimize the social costs of the adjudication system. That is, a mistaken denial or imposition of legal liability may inefficiently increase the social costs, which may take two types: firstly, the social cost of erroneous judicial decisions that may result in an inefficient allocation of loss on the injured party, it may deter others from engaging inefficient (unlawful) conducts or it may reduce the incentives to adopt efficient behaviours.[958] Secondly, the social cost of operating the procedural system incurred by the state and the litigants. [959] On this basis, this thesis argues that the efficiency of procedural law may give the priority to the likelihood test over *the (B v P)* test since the grant of interim injunction may be more efficient than the denial of the injunctive application in the cases involve genuinely private and defamatory information. The rejection of a temporary order in

[956] Hughes, (n 873) 187; Witzleb, (n 35) 432.
[957] Anna Olijnyk, *Justice and Efficiency in Mega-Litigation* (Hart Publishing 2019) 57.
[958] Richard A. Posner, 'An Economic Approach to Legal Procedure and Judicial Administration' (1973) 2 Journal of legal studies 399, 399; Olijnyk, ibid. 58.
[959] Posner, ibid.

privacy may inefficiently increase the social costs resulting from an erroneous judgement or procedural operation.

If *the (B v P) test* rule was applied in the overlapping cases, the mistaken rejection of interim injunction to prevent the publication of private materials may amount to a definitive deprivation to the claimant of her legal rights because not only privacy can never be restored, but also the trial proceedings themselves can augment the personal distress and embarrassment. [960] The social costs of such mistaken judgement cannot be only limited to personal suffering, frustration, disappointment and feelings of anger caused by undermining the intrinsic values of privacy invasion; but it can also undermine the individual's emotional well-being, the promotion of human flourishing and freedom of expression. [961] Such social costs might not be conceived in pure defamation cases since the claimant may find an effective remedy through the trial proceeding itself that publicly declares the falsity of defamatory allegations. [962]

The application of *the (B v P) test* rule in the overlapping cases may also inefficiently increase the social costs of operating of a procedural system equally born by the state and the litigants. The mere awarding of damages after a successful trial may not adequately remedy the claimant' harms simply because her distress may be renewed with each view of private materials available in the public domain. Each new reading or viewing of the private materials regardless of the form of the publication such as video, photo or private information

[960] Mosley, (n 33) 230.
[961] Chris D. L. Hunt, 'from right to wrong: grounding a right to privacy in the wrongs of tort' (2015) 52 Alberta Law Review, 635, 638-641.
[962] Phillipson, (n 891) 74.

represents a new intrusion in the claimant private life that consequently increases the emotional distress of the victims. [963]

This might increase legal actions in the courts since the removal of private materials from the public domain seems the appropriate remedy that may prevent further distress of wrongfully invading private life. Max Mosley, for instance, brought legal proceedings against Google to remove the images of his private sexual activities on websites accessible by search engines on the internet. [964] Due to the limitation of public resources on which the courts rely, the subsequent claims of privacy, like *Mosley v Google,* [965] may create inefficiency in the allocation of courts resources. An efficient procedural system may require the judiciary to prevent any waste of public money and time, which are factually finite. Based on such analysis, the potential augmentation of privacy cases caused by the denial of injunctive applications may not only make a delay in the judicial system caused by the increase of actions, but it might also prevent some citizens from accessing justice due to the limitation of public resources. [966] The costs of further litigations incurred by the litigants are also part of the social costs, which could be efficiently avoided if an interlocutory injunction had been granted in the first place. The fact that privacy litigations may reach six-digit numbers may exacerbate the inefficiency of *the (B v P) test* rule if applied in the overlapping cases.[967] Accordingly, we can argue that the right grant of interlocutory injunctions based on likelihood test could increase access to justice since the costs of obtaining such orders are relatively affordable. [968] By contrast, the denial of interlocutory injunction applications based on *the (B*

[963] *Douglas v Hello! Limited & Others* [2005] EWCA Civ 595 [105]; Witzleb, (n 5) 509.
[964] *Mosley,* (n 596).
[965] Olijnyk, (n 964) 13.
[966] Ibid.
[967] Witzleb, (n 35) 417.
[968] See chapter 3.

v P) test rule may decrease access to justice since the high-costly privacy trial proceedings are only affordable for the claimants of high profile. [969]

The economic analysis may prioritise avoiding such highly social costs over avoiding the costs of granting interlocutory injunctions against freedom of expression. The dangers to delay the publication of information represent the main competing costs of prior restraint orders; however, some information is perishable commodities that may lose their value or interest even by a short delay. [970]. The meaning of news as perishable commodity refers to the information of constant and continuing topicality and urgent quality such as stories about the funding of terrorism. [971] The news could be a perishable commodity if the democracy necessities urgently its publication such as the speech about political matters. [972] However, privacy matters would unlikely to lose their value and interest if the publication was postponed for a short of time because whenever the release takes place, it will feature prominently. For instance, a temporary postponement until the trial of the dissemination of private information such those in Mosley and Terry cases may unlikely affect its value whenever published. Furthermore, most media operators are commercial entities who seek to make financial profits in publishing private materials, and such financial loss, if caused by interlocutory injunction, may be adequately compensated by an award of damages if the court at trial found such order was unjustified. [973]

[969] Witzleb, ibid. 417.
[970] *Mosley,* (n 481) [117].
[971] Ian Cram, 'Reducing uncertainty in libel law after Reynolds v Times Newspapers? Jameel and the unfolding defence of qualified privilege' (2004) 15 Entertainment Law Review, 147, 150.
[972] *Reynolds* (n 603) Lord Steyn.
[973] Witzleb, (n 35) 417.

The Feminist analysis perspective

The undesirability of the *(B v P) test* rule in the overlapping cases may crucially be a prominent argument from feminist analysis perspective since the improper motives, as blackmails or profit-making, are completely irrelevant matters if the defendant decided to defend the publication at trial. The improper motivations such as revenge, humiliation, financial gain and blackmail must be decidedly discouraged from feminist analysis perspective because they may be predicated upon the employment the sexual double standard in society against women. [974] The desirability of injunctive relief from the feminist analysis may prioritise the likelihood test over *the (B v P)* test in the revenge porn cases for the following two reasons. Firstly, it could prevent the employment and reinforcement of the sexual double standard in society that discriminately humiliates women. Secondly, it may discourage the commodification of interest in dignity since allowing a partner to sell the adultery story of the other partner may reinforce his inherent property right to exclusive sexual access to that partner. [975] According to s. (33) of the Criminal Justice and Courts Act 2015, the unconsented disclosure of photograph or film containing a private and sexual material in order to cause that individual distress is a criminal offence. This offence refers to the concept of revenge porn when one malicious ex-partner discloses without authorisation sexual materials whether in form of image, video or information to harm explicitly his or her ex-partner for improper motivations of such disclosures could be revenge, humiliation, financial gain and blackmail. [976]

[974] Samantha Pegg, 'A matter of privacy or abuse? Revenge porn in the law' (2018) 7 Crim. L.R. 512
[975] Richardson, (n 385) 155-8.
[976] *JPH v XYZ & Persons Unknown* [2015] EWHC 2871 (QB); Clare McGlynn, Erika Rackley & Ruth Houghton, 'Beyond 'Revenge Porn': The Continuum of Image Based Sexual Abuse' (2017) Fem. Leg. Stud. 25; Pegg, (n 974)

Revenge porn is a form of sexual abuse that may be equally committed by men and women.[977] In *JPH v XYZ and Persons Unknown*, for instance, Mr Justice Popplewell granted the applicant, a professional actor, an interim non-disclosure order prohibiting the defendant, the applicant's female ex-partner, from disclosing sexual images and videos belonging to the claimant. [978] The judge identified two motivations behind this revenge porn case: firstly, the defendant sought to revenge the claimant because of ending the relationship; and secondly, possible blackmail to resume the relationship. [979] The prior restraint order was granted under s. 12 (3) HRA since the court was satisfied that the claimant is likely to establish at trial the disallowance of publication. [980] The court has implicitly identified the applicant's motivation, as a professional actor, to protect his professional reputation, which, if damaged, may cost him financial losses. [981] The judge rightly applied the likelihood test, instead of the *(B v P)* test because applying the latter test would prohibit granting a prior restraint order if the defendant had decided to defend the publication despite the presence of the improper motives. [982] Revenge porn cases are one of the typical examples of the overlap between defamation and privacy since privacy and reputation issues could equally engage in such disclosures. [983] In *Mosley v MGN,* for instance, despite Mosley's claim was about his privacy right, the adverse effect on his reputation and on the reputation of the four female partners were evident. [984]This could be easily understood by means of the hidden blackmail against

[977] McGlynn, ibid. 27.
[978] *JPH,* ibid.
[979] Ibid. [2 & 8].
[980] Ibid. [9].
[981] Ibid. [8].
[982] Ibid. [8].
[983] Ibid.
[984] The Leveson inquiry into the culture practices and ethics of the press: witness statement of Max Mosley/2011, para. 68
https://webarchive.nationalarchives.gov.uk/20140122165317/http://www.levesoninquiry.org.uk/wp-content/uploads/2011/11/Witness-Statement-of-Max-Mosley.pdf

those partners in case of refusing the cooperation with the defendant. [985] Such improper motives, however, may not weaken the claim of freedom of expression to allow the claimant obtaining an interlocutory injunction if the defendant decided to defend and plead at the trial on of the defence such as the defence of truth under defamation law.[986]

In *Holly v Smyth*, the Court of Appeal discharged an interim injunction granted by the court of the first instant prohibiting the defendant from publishing defamatory allegations of fraud despite the defendant expressed his attention to prove the truth of such claims at trial. [987] Such grant set aside the (B v P) test rule because the defendant was a blackmailer seeking to obtain money in return for his silence. The Court of Appeal rejected this reasoning and held that the binding authority of *the (B v P) test* cannot be overridden simply by the improper motives of the defendant because such 'motives in the proposed publication as less high-minded than the pure desire to let the world know the truth'. [988] By contrast, such improper motives, like blackmail, [989] are relevant considerations that may strengthen the application of the interlocutory injunction in privacy law. [990] The blackmail may negatively affect the weight attached to freedom of expression, and it amounts to a misuse of freedom of expression. [991] Improper motives may not only reduce the weight of freedom of expression, but it may also strengthen the claim of privacy since 'The public interest in preventing blackmail will generally outweigh the public interest in freedom of expression'.[992]

[985] Mosley, (n 33) [82].
[986] Rolph, (n 879) 41.
[987] *Holly,* (n 834)
[988] Ibid. per Sir Christopher Slade.
[989] S. 21 (1) of the Theft Act 1968 defines the blackmail as 'A person is guilty of blackmail if, intending to gain for himself or another ...he makes any unwarranted demand with menaces'.
[990] Rolph, ibid. 41.
[991] *YXB* (n 885) [17]; *LJY* (n 898) [29].
[992] *YXB*, ibid. [34].

Based on this analysis, prioritising the *(B v P) test* based on the nub's approach would encourage motives of revenge and blackmail instead of preventing them since such motives are completely irrelevant matters to reduce the strength of free speech claim if the defendant decided to prove the truth of the defamatory allegations. This would be a very undesirable scenario from the feminist analysis perspective since most disclosures of private information may involve reputational effects. [993] The application of likelihood test in revenge porn cases, as this thesis emphasises, may achieve desirable outcomes, especially for feminist analysis, whether the female partner was a claimant or third party, because the improper motives could be taken into account in assessing the claims in conflict. For instance, in *CC v AB,* [994] Eady J granted an injunction against a cuckolded husband who wanted to publish details of the sexual affair between his wife and CC in the media and over the internet. The judge granted the prior restraint order based on likelihood test since privacy claim outweighs the freedom of expression claim, which was motivated by a desire to revenge and profit-seeking. [995] The judge found the defendant interest in revenging and profit-making may lower his right to publish adultery story since the claimant did not mislead the public nor moralised publicly on family life. [996] The judge took into consideration the effect of publication on third parties in balancing privacy and free speech rights. [997] The defendant's desire to revenge the claimant would cause serious impacts of his wife and the claimant's wife. [998] However, the impact on the defendant's wife could be exacerbated by the sexual double standard in society. [999] The desirability of injunction from feminist analysis perspective may prioritise the likelihood test

[993] Richardson, (n 385) 158.
[994] [2006] EWHC 3083 (QB).
[995] Ibid. [36].
[996] Ibid.
[997] Ibid. [46].
[998] Ibid. [10].
[999] Richardson, (n 196) 158; McGlynn, (n 198) 30.

over the *(B v P)* test in the revenge porn cases for the following two reasons. Firstly, it could prevent the employment and reinforcement of the sexual double standard in society that discriminately humiliates women. Secondly, it may discourage the commodification of interest in dignity since allowing a partner to sell the adultery story of the other partner may reinforce his inherent property right to exclusive sexual access to that partner. [1000]

6. 4: Concluding remarks

This Chapter has considered the impact of the overlap when deciding the appropriate rules of injunctive relief to be applied in privacy law as and when cases overlap with defamation law. The purpose of this chapter has been to examine to what extent the restrictive rule of Bonnard v Perryman as applied in defamation cases should also be applied in privacy cases should both torts overlap. In order to understand the challenge of the overlap around addressing interim injunctions, the chapter has explored in detail the rules of interim injunction applied in defamation (*Bonnard v Perryman* test) and privacy tort (likelihood test) and upon what grounds such tests are justified. The chapter has critically analysed the English judicial approaches towards the application of *Bonnard v Perryman* rule in privacy cases which also involve reputational considerations. By using the framework of coherence, efficiency, and feminist analysis to formulate the lens through which to explore the appropriate rule of interim injunction, this chapter has concluded that the mere existence of reputational harms within privacy actions should not constitute a reason for applying the Bonnard v Perryman's restrictive rule if there is a genuine basis for a privacy claim in the first place. There remains no principled reason to apply the more restrictive rule of defamation law as this seeks to prioritize freedom of expression over privacy interests: both rights ought to be treated with

[1000] Richardson, ibid. 155-8.

equal weight. Three justifications were advanced to support the baselessness of the judiciary attention to applying the injunctive test of defamation in privacy cases involving reputational harms. Firstly, this thesis addressed the objectionable inconsistency between the justifications of the *Bonnard v Perryman* test and privacy law in respect to the role of truth. If truth itself cannot be a defence in privacy law in the first place, there would be an undesirable incoherence to apply *Bonnard v Perryman* that is based on the procedures required to establish the defence of truth. The incoherence would be acute taking into account the fact that reputational interests are protected under article 8 ECHR. The fact that privacy is the core value explicitly protected in Article 8 ECHR may provide a reason to prioritise privacy rules over reputation implicitly protected under this article. There should be an equal weight to the claims of privacy and freedom of expression. Secondly, the application of economic analysis, based on costs and benefits criterion, provides an additional argument for prioritising the right applicable test of interim injunction. This thesis argued that the application of the *Bonnard v Perryman* rule (that likely ends with a rejection of temporary injunction) in privacy cases would inefficiently increase the social costs resulting from an erroneous judgement or procedural operation. The social costs of such a mistaken judgement cannot only be limited to personal suffering, frustration, disappointment and feelings of anger caused by undermining the intrinsic values of privacy invasion; it might also undermine the individual's emotional well-being, the promotion of human flourishment and freedom of expression. The costs of further litigations incurred by the litigants are also a part of the social costs, which could be avoided if an interlocutory injunction had been granted in the first place. The fact that privacy litigations may reach six-digit numbers may exacerbate the inefficiency of the *B v P* rule if applied in the overlapping cases. The final insight of the desirability of the likelihood test of Article 12 (3) HRA 1998 over the *B v P* test, as this thesis defends, could be

derived from feminist analysis. The feminist analysis argues that cases brought forward against women with improper motives (such as blackmail, making profits and revenge porn, sought through the social bias against women within the double standard of sexuality) must be discouraged. The role of such improper motives could be pivotal, as this thesis maintains, to prioritise the likelihood test over the *B v P* test. The conflicting tests differentiate on whether a freedom of expression claim could be weakened if there were improper motives behind the publications in question. Whilst the *B v P* test considers such motives irrelevant if the defendant decided to establish the truth of the information, the likelihood test takes into account motives that reduce the strength of any public interest claim to justify the publication.

Chapter 7: The impact of the overlap on damages

7. 1: Introduction

The overlap between defamation and privacy correlatedly raises three considerable questions concerning the damages. This chapter tackles with the eligibility of the privacy law to include the reputational harms within its scope of damages. This question raises from the fact that privacy right under Article 8 ECHR includes reputational interest within its protective scope to an extent that no separating line could be drawn between reputation and privacy.[1001] This issue remains an open question in the English common law because there are different and inconsistent approaches regarding such matter. Given that the reputational interest is conceptually and doctrinally considered as an inseparable aspect of the private life concept, this thesis argues that it is principally and coherently sound to subsume the harm to reputation within the harms of privacy law. The second correlated question relates to the concept of vindication applied in defamation; this chapter examines to what extent privacy law should take into account the vindicatory purpose of damages awarded in defamation to be also applied in privacy if reputational harms, as this thesis argues, could be protected under privacy law. The chapter examines the final question concerning to what extent the damages of defamation and privacy could be cumulative if these actions were simultaneously brought in respect to the harmfully defamatory and private publication; and whether there could be a double compensation in accumulating such damages. The answer of this question, as this thesis highlights, may vary according to the unipolar or bipolar framework explaining the relationship between the wrong and harm in tort law. These three interrelated questions are respectively examined in the second section of this chapter. It is imperative to determine at

[1001] See chapter 3.

the outset the types of damages that could be awarded in the law of defamation and privacy. The first section, therefore, outlines the size, purpose, and types of damages awarded in defamation and privacy.

7. 2: The types of damages awarded in defamation and privacy

A- Overview of the size and purpose of damages in defamation and privacy law

The English law of defamation requires the defendant to financially compensate the victim in order to repair the interest of reputation wrongfully tarnished. [1002] Awarding damages is the principal remedy in defamation law by which the court seeks to correct the injustices endured by the harmed party. [1003] The damages awarded in defamation cases are described 'at large' because they seek to compensate for losses which are otherwise deemed formally incalculable. [1004] However, libel damages are presently set at a practical ceiling of around £275,000 (allowing for inflation); an amount awarded for the most serious of libels. [1005] The high compensation of defamation law serves three interlocking purposes; compensation, solatium and vindication. The defamed party in a successful action is entitled to a monetary sum adjudged sufficient to repair her besmirched reputation, to get solatium for the distress and humiliation caused and to vindicate publicly her good name. [1006] The weight of each purpose depends on the circumstances of every case. For example, the claimant might suffer serious mental distress with very little demonstrable harm to her

[1002] Mullis & Parkes, (n 26) 324. However, the defendant may offer to make amends according to s. 2 Defamation Act 1996.

[1003] However, according to s. 9 (1) Defamation Act 1996, the court may order a declaration of falsity under the summary procedure and it might also order the defendant to publish a correction and apology if the Claimant only seeks to vindicate her tarnished reputation rather pecuniary damages. Ibid. 325.

[1004] *Rookes v Barnard* [1964] UKHL 1, [1964] AC 1129; Cassell & Co Ltd v Broome [1972] AC 1027, [1972] UKHL 3, [1972] 2 WLR 645.

[1005] *Cairns v Modi* [2012] EWCA Civ 1382 [25]; *Anbananden v Eshan Badal* [2017] EWHC 2638 (QB) [71].

[1006] *John v MGN Ltd* [1997] QB 586; *Cairns*, ibid. [21]; *Galloway v Telegraph Group* [2004] EWHC 2786 (QB) at 201; Anbananden , ibid. [64]

reputation; or, the need for public vindication to clean her name might outweigh the emotional distress caused by defamatory allegations. [1007]

The components of compensation and solatium, in addition to serve the compensatory purpose of harms to reputation and emotional distress, may serve other purposes such as vindication and deterrence. In other words, vindicatory purpose does not constitute a discrete component within the general monetary award. [1008] In the writing and interpretation of the statute, a claimant's need for vindication remains the main reason behind the generosity of the size of damages awarded in defamation, irrespective whether these are to be decided by a jury or a judge. [1009] Nonetheless, in *The Gleaner Co Ltd v Abrahams,* the Privy Council identified another purpose behind compensatory damages awarded in defamation law; deterrence could be mutually inclusive with compensation. [1010]

The deterrent effect of compensatory damages is broadly proportionate to the size of the monetary award, where 'the higher it is set, the greater the deterrence'. [1011] However, Eady J in *Mosley v MGN* attacked the distinct role of deterrence within compensatory damages, on the grounds of the potential chilling effect upon freedom of expression and the undeserved windfall for the claimant. [1012] Nonetheless, his Justice did not deny the compensatory damages' incidental deterrent function, observing instead such a role is not confined to the awarding of such damages but could be also accomplished through gain-

[1007] *Cairns,* (n 1006) [22].
[1008] John Hartshorne, the Value of Privacy, (2010) 2 Journal of Media Law 67, 72.
[1009] Ibid. 73.
[1010] *The Gleaner Co Ltd v Abrahams* [2003] UKPC 55; [2004] 1 AC 628 [53].
[1011] Ibid. at 42.
[1012] *Mosley* (n 33) at 227-8; This reasoning is consistent with corrective justice premise that considers each award of damages exceeding the defendant's gain as an undeserved windfall. Ernest J. Weinrib, 'Restitutionary Damages as Corrective Justice' (2000) 1 Theoretical Inquiries in Law, 1.

based damages since these share the common feature, along with compensatory damages, of penalizing financially the defendant. [1013]

Besides these purposes, there are other decisive factors in assessing the damages awarded within libel claims. For example, the wide or narrow extent of libellous publications,[1014] the seriousness of the libel and to what extent the defamatoriness impugns personal integrity, professional reputation, honour, courage and loyalty, [1015] the relationship between the defamed person and the publisher, [1016] the level of authoritative status afforded to the publisher by society, the role of the defamed person or claimant within the society, family, friends or work colleagues. These are reasonably determinable to the likelihood that any defamatory statements will become more widely propagated, especially within the Internet era. [1017] By contrast, a survey of cases in the context of privacy law demonstrates two distinct judicial approaches towards the issue of privacy damages. Firstly, the conventional approach seeks to award a very modest sum of damages chiefly with a view towards compensating the claimant for any distress caused to her by an infringement of legally defined privacy rights.[1018] The second may be characterised as a hybrid approach which seeks to merge the conventional approach with the vindicatory approach as applied in defamation law. [1019] Eady J applied the latter approach in the course of awarding an unprecedented sum

[1013] Weinrib, ibid; Edelman (n 405) 246.
[1014] *John,* (n 1005) 607
[1015] Ibid.
[1016] Cooper, (n 331) [96].
[1017] *Raj Dhir v Bronte Saddler* [2017] EWHC 3155 (QB) [21]; Cooper, ibid. [96-7].
[1018] Hartshorne (n 1007) 74; *Gulati,* (n 437) [179]; *Applause Store Productions Ltd v Raphael* [2008] EWHC 1777 (QB) [81], in this case, only £2000 has been awarded to compensate the Claimant's emotional distress; In the landmark case of *Campbell v MGN*, only £2500 has been awarded; In *McKennit v As,* only £5000 has been awarded in respect of wrongful disclosures about the Claimant's business and personal life; in *Weller v Associated Newspapers* only £2500 were awarded for Weller's twin young children and £5000 to a 16 year Weller's old girl for publication of unauthorised photographs; In *AAA v Associated Newspapers*, a sum of £15,000 was awarded for the publication of three photographs of a child.
[1019] Hartshorne (n 1005) 76.

of damages (at the time) totalling £60,000 to Mr Mosley in respect of what the court ruled to be a very serious invasion of Mosley's private life. [1020] Eady J here set a precedent for taking into account the vindication factor when assessing privacy damages, noting that: [1021]

> 'Apart from distress, there is another factor which probably has to be taken into account of a less tangible nature. It is accepted in recent jurisprudence that a legitimate consideration is that of vindication to mark the infringement of a right'.

However, his Justice added that such a vindicatory factor might be rejected should other factors lead to the awarding of substantial damages. [1022] Eady J's ruling, however, did not explicitly elucidate the relevant factors that should be taken into account in assessing privacy damages. Nonetheless, the general principles or factors underpinning the assessment of appropriate compensatory damages in privacy law depend on the circumstances of the case in question. [1023] An examination of the most recent cases may help to identify the relevant categories of information that determine the sizes of damages in privacy law. The first of these categories relate to the nature of the information. Mann J in *Gulati v MGN* provided a set of information types subject to a higher standard of privacy protection, which included medical information and financial information, along with details of social relationships, and personal relationships. [1024] The second category pertains to the consequences of privacy infringement, including distress caused, damage to health, damage to autonomy, damage to dignity and damage to reputation. [1025] There are further sub-factors,

[1020] Mosley, (n 33).
[1021] Ibid. [216].
[1022] Eady J explained that: 'If other factors mean that significant damages are to be awarded, in any event, the element of vindication does not need to be reflected in an even higher award'.
[1023] *Burrell,* (n 515) [139].
[1024] *Gulati,* (n 437) [229]
[1025] *Cliff Richard,* (n 312) [350].

which help the court determine the extent and scale of these consequential effects, such as the sensitivity of the Claimant; [1026] the identity of the publishees; [1027] the scope of the publication. [1028] It seems clear that these factors were present and considered within the decision made by Mann J in the recent privacy case law where Mr Cliff Richard was markedly awarded for the publication by a major media outlet of allegations pertaining to serious criminal conduct the highest compensatory damages of £190,000 and aggravated damages of £20,000. [1029] There exists, as defined by the law, legitimate mitigating factors which should be considered in the course of a ruling, such as a 'genuine mistake or a belief in the claimant's consent'. [1030]

The purpose of monetary remedy in privacy was clearly explained by Eady J in *Mosley v MGN*. His honour confined the function of this remedy in ensuring solatium. The interpretive touchstone relating to the misuse of private information is the unauthorised revelation of personal information which can be never rectified through restoration to its original state of privacy once released for general publication. Thus, 'the only realistic course is to select a figure which marks the fact that an unlawful intrusion has taken place while affording some degree of solatium to the injured party'. [1031] In *Cooper v Turrell,* Tugendhat J also reaffirmed the limited function of compensatory damages in privacy cases when his honour held that compensating the distress and hurt feelings of the breached party is the purpose of damages in MOPI. [1032] However, the recent cases have raised the possibility of awarding compensatory damages to mark the infringement of privacy rights even though the

[1026] *Gulati,* ibid. 229.
[1027] *Burrell*, (n 515) 139.
[1028] *Cliff,* ibid; Burrell, ibid. [139].
[1029] *Cliff,* ibid. [358 & 365].
[1030] *Burrell,* ibid.
[1031] *Mosley,* (n 33) at 231.
[1032] *Cooper* (n 331) at 102.

claimant had suffered no quantifiable mental distress. In other words, damages in the context of privacy may either constitute an award compensating for the diminution of a right to control formerly private information, or for the distress that the Claimant could justifiably have suffered because given her private information had been exploited. [1033] Eady J and Tugendhat J agreed that the main distinction between defamation and privacy damages lies within that vindicatory function, which is one of the key tenets within the determination of defamation awards that may restore the tarnished reputation to its previous position.[1034] Conversely, this function remains an impossible objective in privacy since privacy is 'like an ice cube' and it is gone forever once melted. [1035]

B- Compensatory damages in defamation and privacy

Compensatory damages could be divided into three categories, which reflect the subject matters of compensation. There are compensatory damages in defamation and privacy seek to address pure losses, consequential losses caused by the injurious publication and the harms caused by the defendant malice.

Compensatory damages for pure losses

Defamation law recognises a separated head of damages to redress the loss of reputation caused by the defamatory imputations. This kind of damage has a dual function: it provides the victims a compensation and vindication. In *Galloway v Telegraph Group,* Eady J held that an injury to reputation has to be appropriately compensated by monetary damages that also serve to vindicate the Claimant's besmirched reputation. [1036] However, vindication is not an independent component of general damages, but it is one of the purposes served by the

[1033] *Gulati* (n 437) at 48.
[1034] The vindicatory function of defamation and privacy damages will be discussed in the next section.
[1035] *Mosley,* (n 33) at 230; *Cooper,* ibid. at 102; Hartshorne, (n 322) 103.
[1036] (n 1005) [201]

global award of damages. [1037] In this instance, Eady J awarded Mr Galloway, a former Member of Parliament, the sum of £150,000 in respect of what were adjudged libellous journalistic claims that Galloway had received financial support from the former Iraqi president Saddam Hussein. Such a generous award was justified by the Court for: 'the purposes of restoring his reputation [with Eady adding that] I do not think those purposes would be achieved by any award less than £150,000'. [1038]

The English privacy law, like defamation law, provides compensatory damages for the loss of privacy itself, irrespective whether or not the Claimant suffers consequential losses. In *Weller v Associated Newspapers Ltd*, Dingemans J awarded the three Weller children compensatory damages of £2500 each for what was adjudged to constitute a misuse of private information, irrespective of the existence or non-existence of consequential losses related to distress. [1039] Similarly, in *AAA v Associated Newspapers Ltd*, Mrs Justice Nicola Davies awarded damages of £15,000 on the basis that the defendant breached the child's Article 8 rights by publishing her photo which had been taken in public space without her mother's consent. [1040] The clearest example of recognising the new category of damages based on loss of privacy can be found within the *Gulati v MGN* judgement. Mann J's damages approach is based on upon the principle of right-invasion, where every invasion of a right imposes prima facie a right to a remedy. [1041] Privacy as a tort implies the obligation to respect an individual's private life, hence each misuse of such right represents a wrong which itself rightfully attracts damages. [1042] Privacy, therefore, is an actionable tort *per se,* because the

[1037] Hartshorne, (n 1007) 72.
[1038] *Galloway,* ibid. (Summary conclusion)
[1039] *Weller,* (n 227) [192].
[1040] (n 190) [127].
[1041] *Gulati,* (n 437) [115].
[1042] Ibid. [143].

mere interference with the protected interest of privacy constitutes a pure loss, and it gives rise to a separate category of damages. [1043] Mann J emphasised that a separate category of compensatory damages ought to be awarded to reflect the fact of privacy invasion because: [1044]

> 'If one has lost "the right to control the dissemination of information about one's private life" then I fail to see why that, of itself, should not attract a degree of compensation, in an appropriate case. A right was infringed, and loss of a kind recognised by the court as wrongful was caused. It would seem to me to be contrary to principle not to recognise that as a potential route to damages'.

This approach was judicially reaffirmed in other privacy cases. For instance, in *Shakir Ali and Shahida Aslam v Channel 5 Broadcast Limited*, [1045] Mr Justice Arnold recently confirmed that 'Compensation for misuse of private information may be awarded even if it does not cause distress.' Based upon these precedents, the claimant in a privacy case may thus be entitled to claim compensatory damages under three different categories of damage: damages for the misuse of private information, damages for distress, and aggravated damages.[1046] Nevertheless, the judge awarded £10,000 solely and specifically relating to the distress caused by the Defendant's TV programme through its unjustified disclosure of private information to 9.65 million viewers, given that the claim of privacy was made upon the basis of these specific damages. [1047]

[1043] Jason N. E. Varuhas, 'Varieties of Damages for Breach of Privacy' in Jason N. E. Varuhas and Nicole A. Moreham (eds) *Remedies for Breach of Privacy,* (Hart Publishing 2018).
[1044] *Gulati,* ibid. [111].
[1045] [2018] EWHC 298 (Ch) [213]; see also: Burrell (n 64) [133-4].
[1046] *Shakir Ali,* (n 1052) [212].
[1047] Ibid. [215].

An analysis of relevant cases may indicate that damages for loss of privacy *per se* could be awarded alongside additional compensation in the same instance for loss of dignity, autonomy and control over the publication of private information as explained by Lord Hoffman in the leading case of *Campbell v MGN*. [1048] However, in *Mosley v MGN,* the formulation of damages referencing a loss of dignity was used interchangeably or synonymously with a loss incurred relating to distress and hurt feelings. The loss of dignity may describe the indignity and humiliation caused by the breach of one's privacy right. [1049]

In *Gulati v MGN*, the loss of dignity was made explicitly coterminous with a loss of privacy within Mann J's ruling. [1050] The loss of privacy was similarly used with the loss of autonomy. Mann J explained this interchangeable use in describing the invasion of privacy as depriving the claimant of their autonomy 'There is compensation for loss of privacy or "autonomy" resulting from the hacking or blagging that went on'. [1051] His honour went on to explain the parallel use of autonomy and privacy by saying: [1052]

> 'Those awards include compensation for the acts of invasion of privacy (hacking and private investigator blagging) which led to the publication of the articles and the acquisition of the information on which those articles were based. In addition, she is

[1048] (n 5) [51].
[1049] (n 33) [216]; *Shakir Ali*, ibid. [148]; Eric Descheemaeker, 'The Harms of Privacy' (2016) 8 Journal of Media Law, 278, 285.
[1050] Mann J explained: 'I have already found that the damages should compensate not merely for distress …, but should also compensate (if appropriate) for the loss of privacy… This may include, if appropriate, a sum to compensate for damage to dignity or standing, so far as that is meaningful in this context and is not already within the distress element'. *Gulati* (n 437) [168].
[1051] Ibid. [108].
[1052] Ibid. [287]. The loss of autonomy comprises three constitutive elements: the deprivation of a meaningful choice that the Claimant had the right and capability to exercise; an injury to the Claimant's interest; and irreversibility. Tsachi Keren-Paz, 'compensating injury to autonomy: a conceptual and normative analysis' in Kit Barker, Karen Fairweather, Ross Grantham (eds) *Private Law in the 21st century* (Hart Publishing 2017) 421-2.

entitled to compensation for the commission of the wrongs (depriving her of her autonomy)'.

Accordingly, a loss of privacy is indeed a loss of autonomy because the claimant is deprived of control over the dissemination of her personal information and such a loss is irreversible and can never be completely rectified. [1053] The Court of Appeal in *Gulati v MGN*, furthermore, described the loss of privacy by a loss or diminution of a right to control formerly private information. [1054] It is worth clarifying here that such loss of privacy should not be distinguished from the above concepts within any legal judgement, because this would formally duplicate the same injury when evaluating damages. [1055] However, the courts in recent cases have considered the loss of privacy as one of the myriad factors upon which the sum of overall damages should be assessed, rather than making a separate award in respect of this type of loss. For example, in *TLT and others v Secretary of State for the Home Department,* [1056] it was held that damages can be principally awarded in respect of the loss of control over personal and confidential information. Mitting J, unlike Mann J in *Gulati v MGN,* refused to allocate a separate set or category of damages to reflect this loss since 'it is neither necessary nor desirable to make a separate award in respect of this head of damage'. [1057] This approach was also followed within *Cliff v BBC,* where Mann J considered the loss of control over the use of private information (loss of privacy), emotional distress, the loss of dignity and the loss of reputation as relevant factors to be taken into account in assessing the general compensatory damages relating to the privacy suit. [1058] It would be interesting to conclude in

[1053] Erika Chamberlain, 'how should damages be assessed for harmless breach of privacy?' in Kit Barker, Karen Fairweather, Ross Grantham (eds) *Private Law in the 21st century* (Hart Publishing 2017) 402.
[1054] *MGN v Gulati & Ors* [2015] EWCA Civ 1291 [148].
[1055] Descheemaeker (n 1056) 284.
[1056] [2016] EWHC 2217 (QB) [17].
[1057] Ibid.
[1058] *TLT and others* (n 1057)

this paragraph that there would be, practically speaking, no implication to treat the harm to privacy under an independent head of damages or merge it with other elements under one global award since such harm will be financially redressed in any way.

Compensatory damages for consequential losses

Defamation law recognises the second category of damage that seeks to redress the distress, hurt and humiliation caused by the defamatory publication. [1059] In *Monroe v Hopkins,*[1060] Warby J clarified the function of this category by describing it as 'parasitic on proof of harm to reputation and needs to bear some relationship to that harm'. Eric Descheemaeker explains parasitic interests as those stemming from a violation of the primarily protected interest (reputation), and therefore this is eligible to be taken into consideration and redressed by defamation law within the scope of damages. [1061] For example, a loss of employment following an injury to reputation falls within the protective scope of defamation; whereas a loss of employment without an injury to reputation does not. If defamation law protects parasitic interests as the mental wellbeing interest (subject to general rules of causation and remoteness), there should be, principally speaking, no reason to exclude other pecuniary or non-pecuniary interests when they constitute consequential losses stemming from the primary injury to reputation[1062]. It is argued that the legally protected right to freedom of expression might be disproportionally interfered within the course of facilitating such a recovery of pecuniary losses (special damages) in addition to seeking redress in relation to core loss of reputation within defamation law. Ergo, since reputation interest is the central axis of protection within defamation law, the injured party

[1059] John (n 1007)
[1060] [2017] EWHC 433 (QB) [76].
[1061] Descheemaeker, (n 91) 616.
[1062] Descheemaeker, (n 91) 615; Eric Descheemaeker, 'Three Keys to Defamation: Media 24 in a Comparative Perspective' (2013) 130 South African Law Journal, 435.

should be only permitted to vindicate her tarnished reputation through recourse to general compensatory damages.[1063] This view might be supported by *Lonrho v Fayed* when the court of appeal ruled that a loss of reputation and injury to feelings should be only redressed through defamation law. [1064] However, Tugendhat J in *Thornton* made a distinction between personal reputation as part of the right to private life in Article 8 ECHR, and professional reputation in respect of commercial or property rights in Article 1 of the First Protocol ECHR. This distinction might open the doors in English courts to recover special damages through defamation law. [1065]

Privacy law approach, similar to that applied within defamation, provides a compensatory remedy for the consequential losses. The main award in privacy action seeks to remedy mental distress caused by the unauthorised disclosure of private information. In *Mosley v MGN,* Eady J awarded an unprecedented (at the time) financial remedy of £60,000 for 'the purpose of acknowledging the infringement and compensating … for the injury to feelings, the embarrassment and distress caused'. [1066] The term 'mental distress, as deployed and defined within rulings,' encompasses an expansive and ever supplementary variety of harmful effects or disruptions affecting emotional tranquillity or wellbeing (including mental harm, loss of happiness, and emotional harm). [1067] However, it is a practically contentious and theoretically unsettled issue, judicially speaking, as to whether damages for emotional distress should constitute a separate category of damages or remain defined as one of the factors underpinning the assessment of compensatory damages.

[1063] John Campbell, 'An Anomaly: Special Damages for Libel' (2011) 3(2) Journal of Media Law 193, 196.
[1064] (No.5) [1993] 1 W.L.R. 1489
[1065] Campbell, ibid. 197.
[1066] (n 33) [235].
[1067] Descheemaeker, (n 1056) 283.

In the leading case of *Gulati v MGN,* Mann J awarded the claimants significant amounts of damages under three grounds: (1) the instance of hacking itself, by implication intrusive and contravening the Claimants legal rights to privacy; (2) the publication of private information obtained by the hacking; and (3) the emotional distress resulting from the hacking. [1068] Lady Justice Arden rejected the Defendant's argument that damages in the misuse of private information should be awarded only with regards to the distress caused. [1069] However, this approach was deemed unnecessary and undesirable when assessing damages to be awarded in respect of a loss of control around personal information resulting from the Defendant's conduct. For example, in *TLT v Secretary of State for the Home Department* Mitting J held that the loss of control should be taken into account when assessing the distress experienced by the Claimant relating to the unauthorised disclosure of private information rather than constituting an independent category of damages. [1070] The majority of consequential losses rulings within privacy cases are predicated upon a determination of emotional distress caused by a breach of privacy; nevertheless, consequential losses could also include pecuniary loss. In order to recover such losses under privacy law, it becomes necessary to formulate a claim specifically subject upon the grounds of determining causation and remoteness. [1071] Nonetheless, an economic loss might be absent within the context of a specifically privacy-based claim, since a claim made for such losses could be brought to court on alternative grounds, including breach of confidence and breach of contract. [1072] The pecuniary loss might nevertheless be conceivably recovered within a privacy suit. Should the latter overlap with defamation law, in such a hypothetical

[1068] *MGN v Gulati & Ors* [2015] EWCA Civ 1291 [8].
[1069] Ibid. [48-9].
[1070] (n 1055) [17].
[1071] Varuhas, (n 1044).
[1072] Descheemaeker (n 1056) 281-2.

overlap, economic loss consequentially caused by defamatory allegations might be recovered under what would be a termed a 'disguised privacy cause of action' by the Claimant, should the defamatory allegations also be private. [1073]

Compensatory aggravated damages

The court may increase the compensatory damages by awarding aggravated damages that are ordered and assessed according to the defendant's malicious conduct and her state of mind. [1074] There are several factors taken into account when assessing these damages: a determination of malice aforethought by the Defendant, malicious repetition of statements deemed defamatory, exacerbating the injured feelings of the claimant, the defendant's failure to withdraw the defamatory statements and the Defendant's conduct in litigation such as malicious use of the defence of truth. [1075] Aggravated damages are equally recognised within defamation and privacy torts. For example, in *Barron and Anor v Vines,* [1076] Warby J held that the defendant's malice constituted one factor where aggravate damages would be deemed appropriate[1077]. Furthermore, King J in *Woodward v Grice, [1078]* awarded £8000 in aggravated damages as part of a libel ruling based upon the Defendant's state of mind in publishing the libellous statements. This was due to, firstly, a determination of the Defendant's recklessness with regards to whether the statements complained of were true or false. Secondly, the Defendant's motivation *hostile animus* towards the Claimant. Thirdly, the Defendant's persistence in maintaining his allegation until it was proven he was wrong.

[1073] Ibid. 383.
[1074] Mullis & Parkers (n 26) 353; Andrew Kenyon, Problems with Defamation Damages (1998) 24 Monash University Law Review, 70, 73-4.
[1075] Mullis & Parkers, Ibid.
[1076] [2016] EWHC 1226 (QB)
[1077] Ibid. at 21 (4).
[1078] [2017] EWHC 1292 (QB) [82]

Finally, the Defendant was directing several damaging slurs against the integrity of the Claimant during legal proceedings. [1079]

The claimant in privacy law, as in the case of defamation, is entitled to claim aggravated damages where the claimant's proper feelings of dignity and pride are injured by the defendant's injurious conducts during the course of legal proceedings themselves. [1080] Mann J in *Cliff v BBC* asserted unequivocally the existence and applicability of such damages relating to privacy within English law. [1081] His justice awarded £20,000 as aggravated damages for the additional distress caused by the BBC's conduct after the initial infringement of Sir Cliff's privacy when the defendant submitted the broadcast in question for a Royal Television Society award. This conduct, reflecting the defendant's extreme pride in repeating and promoting the invasive activity with metaphorical fanfare, therefore formally aggravated the claimant's damage caused by the initial invasion. [1082]

C- Non-compensatory damages in defamation and privacy

Exemplary damages and gain-based damages are both non-compensatory damages predicated upon a similar deterrence rationale function; in each case, they strip the defendant of those undeserved gains obtained by the deliberate wrong. [1083] The purpose of such damages in a libel action, therefore, is to punish and deter the defendant, especially those of greater resources (such as media conglomerates), from continuing to publish

[1079] Aggravated damages raise a controversial debate about the protected interest under this category of damages. P. Birks, 'Harassment and Hubris: The Right to an Equality of Respect' (1997) 32 IJ 1–45, 30 cited in Descheemaeker (n 91) 614; John Murphy, 'The nature and domain of aggravated damages' (2010) 69 Cambridge Law Journal, 353, 366.
[1080] *Mosley,* (n 33) [222-3]; Varuhas, (n 1044).
[1081] *Cliff,* (n 312) [360]; *Gulati,* (n 437)) [203] however, Mann J in Gulati case did not award aggravated damages under a separate head; rather, he merged a modest sum of aggravated damages in respect of the manner and content of the cross-examination with the general damages awarded to Mr Yentob. *Gulati,* ibid. [251 ii] & [252].
[1082] *Cliff,* ibid. [365].
[1083] Normann Witzleb, 'Exemplary Damages for Invasions of Privacy' (2014) 6(1) JML 69, 72.

libellous publications. English law allows the award of exemplary damages in only three instances: if damages are expressly authorised by statute; damages are in regard of oppressive, arbitrary or unconstitutional actions by servants of the government; or the wrongdoer is adjudged to have attempted an intentional gaining of economic advantage in excess of her payable compensation as determined by a liability ruling. [1084]

The nature of the cause of action plays a role in the applicability or non-applicability of an award. In other words, tort law such as torts of trespass and malicious falsehood are the territory of exemplary damages, whereas gain-based damages are available for equitable wrongs or breaches of contract. [1085] In *John v MGN,* the court of appeal amended an award of exemplary damages from £275,000 to £50,000. [1086] It was ruled that exemplary damages may be awarded in libel action if the defendant had no genuine belief in the truth of her defamatory publication, or she acted to gain an economic advantage by cynical calculation of likely outcomes arising from the publication and dissemination of the libel (namely she would make herself financially better off). [1087] However**,** exemplary damages in English privacy law were the subject of gradual change based on the development of privacy-protection precedents. Initially, in *Mosley v MGN,* Eady J refused to recognise exemplary damages as falling within the scope of privacy based on two grounds: firstly, such damages were permissible within the scope of the tort and there was no authority allowing the extension of these damages into the domain of equitable wrongs; secondly, exemplary damages were inconsistent with Strasbourg jurisprudence. [1088] The first reason is no longer tenable since it is now well settled within English law that the infringement of privacy right is a tortious wrong

[1084] *Rookes,* (n 1011)
[1085] *Kuddus v Chief Constable of Leicestershire Constabulary* [2002] 2 AC 122 (HL); Witzleb, ibid.
[1086] *John*, (n 1005) 626; *Broome,* (n 1011)
[1087] *John*, Ibid. 618-9.
[1088] Mosley (n 33) at 196-7.

and the misuse of private information constitutes a tort. [1089] The second reason is unpersuasive for several reasons. [1090] Firstly, it would be inconsistent for the domestic courts to comply with the Strasbourg Court regarding exemplary damages and then go on to disregard the Strasbourg Court in respect of aggravated damages. This is because neither aggravated nor exemplary damages were recognised by Strasbourg jurisprudence, whereas both damages have long been important aspects of the English law. Secondly, the reason behind the Strasbourg Court's reluctance to award exemplary damages against member States is based around the ambit of its prescribed role as an international supervisory body. [1091] Finally, the Strasbourg jurisprudence disallows exemplary damages only when such damages disproportionally and adversely affect freedom of expression; thus, exemplary damages constitute an objectionable remedy only when they produce chilling effects and disproportionate interference with free speech rights. [1092] Witzleb submits that nothing can prevent rulings on exemplary damages within a democratic society when such damages seek to necessarily redress those most reprehensible forms of press misconducts. [1093] In *PJS v NGN,* The Supreme Court expressed an implicit approval of necessary and proportionate awards relating to exemplary damages in order to deter and punish deliberately flagrant breaches of privacy and provide adequate protection for the person concerned. [1094] Nonetheless, exemplary damages remain an exceptional remedy and a last judicial resort to punish the defendant's outrageous and unjustified conduct. This is in the event of such punishment goals remaining unachievable through other available remedies such as compensatory and

[1089] *Vidal-Hall v Google Inc* [2014] EWHC 13 (QB); *NT1 and NT2 v Google LLC* [2018] EWHC 799 (QB); Cliff, (n 312)
[1090] Varuhas, (n 1044)
[1091] Ibid.
[1092] Ibid.
[1093] Witzleb (n 1090) 92.
[1094] (n 154) [42]; It might be worthy to mention that there is a sharp criticism has been addressed to the unjustified discrimination created by the provisions of this Act between regulated and unregulated publishers. Witzleb, ibid.90-1.

aggravated damages. [1095] This might explain why there is no single case of privacy, presently, in which exemplary damages were awarded.

Gain based damages, also known as 'account of profit' or 'disgorgement damages', is the second form of non-compensatory damages that strip the defendant of those undeserved gains acquired by her a deliberate wrong. [1096] However, defamation law differentiates from privacy law on the recognition of such a remedy. The absence of gain-based damages in defamation law can be explained by the following two reasons. Firstly, there is no need of such relief since exemplary damages not only serve the same function of gain-based relief (namely stripping the defendant from any unjustified profits gained by the defamatory publication), but also fulfil a punitive function. [1097] Secondly, gain-based damages are only concerned with reparations pertaining to unjust enrichment. [1098] There may be some technical difficulty encountered in assessing the precise profits gained by media outlets in respect of the defamatory publication, since the article or entry to which the successful defamatory suit relates is not sold in isolation. [1099] Conversely, this goal of reparation could be achieved through the function of exemplary damages in addition to the goals relating to punishment and deterrence that lie within the court's purview. Sometimes general damages (compensatory and aggravated) are not sufficient or adequate, from the court's point of view, to punish the contumelious or outrageous way in which the wrong was committed. [1100]

[1095] Ibid. 86.
[1096] Ibid. 87.
[1097] Ibid.
[1098] Ibid.
[1099] Normann Witzleb, 'Justifying Gain-Based Remedies for Invasions of Privacy, (2009) 29. Oxford Journal of Legal Studies 325, 354.
[1100] Keynon (n 1081) 74

Privacy law, unlike defamation law, may strip all profits gained by the defendant if an 'account of profits' being opened.[1101] Arguably then, gain-based relief should in principle strip gains emerge as the natural outcome of the court ruling that the defendant made unauthorised use of the right-holder exclusive entitlement. [1102] Such an account of profits may perform a deterrent function within actions where exemplary damages are unknown, as with the equitable doctrine pertaining to breach of confidence. [1103] This remedy may be the best choice in cases where the claimant suffers no determinable loss and where, consequently, no compensatory damages could be awarded on the grounds of loss. Nevertheless, it may be argued in turn that each wrongful interference with a protected interest causes normative damage; therefore, compensatory damages may be legitimately awarded irrespective of whether the claimant suffered any consequential or material losses.[1104] Furthermore, compensatory damages may avoid an objectionable windfall gain for the Claimant that could potentially result from awarding such account of profits. [1105] Varuhas argues that an account of profits remedy might exceptionally serve a vindicatory purpose in privacy law when wrongful interferences were committed specifically with the intention of profiting financially. [1106] Nonetheless, there are arguments challenge the potential benefits of applying gain-based damages within the privacy context. Firstly, there are some breaches of privacy that produce no discernible material profit for the wrongdoer, including unauthorised publications of private information on social media like Facebook or Twitter. [1107] Secondly, the account of profits is an ineffective remedy in those instances where the private

[1101] *Walsh v Shanahan* [2013] EWCA Civ 411 [57]
[1102] Sirko Harder, 'Gain Based Relief for Invasion of Privacy' (2011) Monash University Research Paper No 2011/18
[1103] Witzleb (n 1090) 87; Edelman, (n 405); Varuhas (n 1044).
[1104] Varuhas (n 1044)
[1105] Ibid.
[1106] Ibid.
[1107] Hartshorne (n 1005) 82; *Applause Store Productions Ltd* (n 1025)

information in question relates to lower-profile individuals. This inefficiency stems from such invasion of ordinary claimants' rights to privacy being unlikely to generate great revenues, in contradistinction to those concerning major celebrities, even though the former may suffer greater harm than the latter.[1108] However, exemplary damages remain more advantageous in principle than an account of profits for several reasons. Exemplary damages may achieve a greater deterrent effect than those achieved by an account of profits since the former can exceed, if any, profits gained in the course of privacy violation. [1109] Additionally, compensatory and exemplary damages are cumulative remedies that can be awarded together, whereas compensatory damages and account of profits are mutually exclusive alternatives and the claimant thus needs to elect one remedy. [1110] Exemplary damages, practically speaking, are easier than making an account of profits because it is not only difficult to prove and calculate profits derived from the wrong, especially if they are intermingled with other profits; but the defendant's skill and expenses also need to be assessed, taken into account and discounted when calculating such profits. [1111]

7. 3: The impact of the overlap on damages in defamation and privacy

This section addresses respectively the three correlated questions concerning the impact of the overlap on damages. Firstly, I examine the question related to the inclusion of reputational harm within the harms of privacy law; then the question related to the application of the vindication concept in privacy; and finally the question of a potential accumulation of damages in defamation and privacy actions raised from a single set of facts.

[1108] Hartshorne, ibid. 83.
[1109] Ibid. 87.
[1110] Varuhas (n 1044) 35.
[1111] Ibid.

A- The inclusion of the harm of reputation within privacy damages

This thesis sees it as imperative that MOPI may provide the claimant an indirect protection to her reputational interest as part of the private life right under Article 8 ECHR. This view has been firstly supported in *Cliff Richard v BBC*. [1112] In this case, Mann J awarded an unprecedented amount of compensatory damages totalling £190,000 for the unauthorised publication of the police investigations and the raid of his house in respect to which Sir Cliff had a reasonable expectation of privacy. [1113] In assessing the general damages, the judge took into consideration not only the loss of privacy inherent in the loss of control over the dissemination of private information, but also the loss of reputation or standing resulting from the violation of the Claimant's right to privacy: [1114]

> 'Damages can and should be awarded for distress, damage to health, invasion of Sir Cliff's privacy (or depriving him of the right to control the use of his private information), and damage to his dignity, status and reputation'.

Despite the fact that Sir Cliff's claim was founded upon privacy grounds, Mann J could not ignore the factual loss of reputation caused by the breach of privacy where 'some damage to reputation is inherent in the facts of the present case, and can fairly be seen as being part of the reason why Sir Cliff felt it necessary to lower his public profile after the search'. [1115] The reason why Sir Cliff did not bring defamation proceedings to vindicate and remedy his loss of reputation in this case caused by the publication of true information, was indubitably grounded within the knowledge he or his legal team had of the possible truth defence available to defendants within defamation proceedings and consequent anticipation of the

[1112] *Cliff Richard* (n 312)
[1113] Ibid. [261 & 358]
[1114] Ibid. (n 312) [350, A].
[1115] Ibid. [335].

defendant's having recourse to this line of defence. However, in contradistinction, such a defence does not exist within privacy law (as has already been shown) and hence he was able to sue under this area of the law on the grounds of harm raised within the scope of privacy, in respect of its statues pertaining to the unauthorized dissemination of true matters. [1116]

It is unsettled, judicially speaking, whether Mann J approach, that subsumed reputation within the losses caused by privacy invasion, should be the exception rather the rule, or whether it is right in principle to include reputational interest within the protective scope of MOPI. In *ZXC v Bloomberg LP*, Mr Justice Nicklin recently objected this approach, since extending the scope of damages in privacy to a reputational element may represent an unjustifiable interference with freedom of expression. The judge believes that the defences of defamation law strike the right balance between Article 8 and 10 ECHR, and any award of reputational damages without allowing the defendant to rely on such defences may amount to altering the balance between conflicting rights of reputation and freedom of expression since the claimant may be entitled to monetary awards for true information. [1117] The law protects only the deserved reputations that are built on truth, and therefore no damages must be awarded to redress reputational harms built on a false basis. Based on this analysis, Nicklin J was bound to reinterpret 'the right to esteem and respect of other people' as one of the protected values in MOPI from an individual's reputation to personal standing which could be an element of privacy damages. [1118] However, Nicklin J allowed the inclusion of reputational harm within the elements of privacy damages, only if the defendant had permission to rely on defences applied in defamation (such as truth). [1119] There is a clear

[1116] Ibid. [345].
[1117] *ZXC* (n 60) [149, iv]; *Campbell* (n 5) [51].
[1118] *Campbell* (n 5) [151[].
[1119] Ibid. [150] iii.

inconsistency between Nicklin J and Mann J approaches toward the function of privacy law to protect the reputational harm caused by the unjustified invasion of privacy rights.[1120] In order to determine the right approach, it would be necessary to analyse the conflicting approaches from domestically binding authorities.

If one compares these approaches with the principles ruled by the Supreme Court in *Khuja v Times Newspapers Ltd,* it is obvious that the Mann J approach reflects a higher degree of coherence with those principles than Nicklin J approach. The Supreme Court ruled that the wide ambit of the right to privacy based on Article 8 ECHR could provide the right to reputation an alternative means of protection besides the law of defamation.[1121] There is no wrong in principle to invoke the right to privacy to protect individual reputation from any collateral impact if the claimant had a reasonable expectation of privacy since privacy and reputation are interlinked interests. [1122] On this basis, Mann J ruled that the protection of reputation is the shared function of the defamation and MOPI tort; however, the judge identified the dichotomy of falsity and truth as a distinguishing line between the scope of defamation and privacy in which reputational interest could be protected. [1123] In other words, reputational harms could be protected within the scope of privacy if the private information were true. In this respect, one may ask to what extent such harms should be compensated if they arise from the publication of false private information.

The answer to this question should not be different from the scenario of true private information, since the truth or falsity is an irrelevant issue to protect private information from

[1120] *Cliff Richard* (n 312) [345].
[1121] (n 320) [21].
[1122] Ibid. [34, 3].
[1123] *Cliff Richard* (n 312) [345].

wrongful invasion. [1124] It might be interesting to mention that Nicklin J did only discuss the possibility to award damages to redress reputational harms caused by the publication of true private information, even though his honour acknowledged the potential overlap between defamation and privacy raised from the false private information. [1125] In the latter scenario, namely false privacy cases, there would be crucial incentives to include reputational harms within the elements of damages in privacy law whether from an economic analysis of civil procedures or fairness perspective. If the court considers the reputational harms within the elements of damages in privacy, opposite to Nicklin J approach, there would be an efficient minimisation in the judicial costs of litigations, whether those costs are born by the litigants or the costs of operating the judicial system are bared by the State, since the claimant would have no interest to bring additional defamation proceedings to redress her loss of reputation caused by false private information.[1126] The court cannot award damages to redress the loss of reputation and emotional distress under defamation action if the claimant brought successfully another action of privacy in respect of the same set of facts since such awards would amount to double compensation. [1127]

Furthermore, Nicklin J's approach may cause injustice to the victims who suffer reputational harms caused by serious invasions of privacy since not all invasions of privacy could satisfy the tests of defamation law. In other words, the publications, which may represent a wrongful interference with privacy rights, may not necessarily represent a wrongful interference under defamation law since each law has its own tests. For example, the allegations of homosexuality, whether true or false, may cause a serious invasion to an

[1124] *Mckennitt*, (n 12) [86].
[1125] *ZXC* (n 60) [149, i & iii]
[1126] Posner, (n 965); Olijnyk, (n 964) 57.
[1127] *Cooper,* (n 331).

individual's right to privacy; but, such allegations might not cause serious harm to the reputation interest in order to be actionable under defamation law since the social status of homosexuality is a subject of change over time and challenges of significant shifts in social mores. [1128] In *BVC v EWF,* Parkes QC J granted the claimant a summary judgement based on MOPI action arising from the disclosure of details of the claimant's homosexual relationship with the defendant. [1129] The judge found the disclosure of sexuality, health and financial information published in the defendant's website represents several breaches to the claimant's reasonable expectation of privacy, since such information represents the core of protection of Article 8 ECHR. [1130] Parkes QC J identified the potential overlap between defamation and privacy, as the allegations in suit may have an equally adverse impact on the claimant privacy and reputation interests, but the claimant may not be eligible to bring defamation proceedings in respect the revelation of his sexuality since such allegation is true and non-defamatory. [1131]

> 'In fact, the matter which most concerns the Claimant (the revelation of his sexuality) is both admittedly true and not defamatory of him, so to that most important extent he would have no remedy in defamation. I accept that there are reputational aspects to the claim, as is very often the case in privacy actions, but I do not agree that the nub of the claim is the protection of the Claimant's reputation'.

[1128] Rolph, (n 317) 127; Eric K.M. Yatar, Defamation, Privacy, and the Changing Social Status of Homosexuality: Re-Thinking Supreme Court Gay Rights Jurisprudence, (2003) 12 Law & Sexuality: Rev. Lesbian, Gay, Bisexual & Transgender Legal Issues, 119, 130.
[1129] [2019] EWHC 2506 (QB)
[1130] Ibid. [136-7 & 146] the judge also ruled that no public interest could be established by the defendant to outweigh the claimant reasonable expectation of privacy since the story of ex-homosexual lovers was a private matter concerning private parties.
[1131] Ibid. [239].

Thus, it would be unfair for the claimant to eliminate the reputational harms from the scope of privacy under the pretext that the protection of reputation concerns exclusively the law of defamation if the information cannot engage the defamation in the first place. Nicklin J's approach may inflict injustice on the victims of privacy invasions, since there would be no legal recourse to remedy her reputational harms caused by the unauthorised publication of private but non-defamatory information. Since the touchstone of defamation is whether the information was *defamatory*, the truth or falsity of such information is an irrelevant matter if it was non-defamatory in the first place. [1132] Based on this analysis, the approach of Nicklin J which definitively eliminates the reputational harms from the scope of privacy is undesirable and potentially harmful. By contrast, the approach of Mann J is consistent with the binding authority in *Khuja v Times,* since Mann J allowed the recovery of reputational harms within privacy law if the information falls within the protective scope of privacy. [1133]

> 'The protection of reputation is the primary function of the law of defamation. But although the ambit of the right of privacy is wider, it provides an alternative means of protecting reputation which is available even when the matters published are true'.

B- The vindication of the right to privacy

One of the central purposes of bringing defamation proceedings and subsequently awarding damages concerns the claimant's willingness to vindicate her besmirched reputation. [1134] Such purpose, however, has no explicit role within the purposes of damages awarded in privacy. [1135] If reputational harms should be recognised in privacy law, as

[1132] See chapter 3.
[1133] *Khuja*, (n 320) [21].
[1134] *McLaughlin v Lambeth BC* [2011] EMLR 8 [112], Tugendhat J emphasised; Hartshorne (n 1005) 72; Rolph, (n 880) 303.
[1135] See previous section.

previously argued, then it needs to be explored whether privacy law should recognise the vindicatory purpose within the damages awarded as applied in defamation law. The basic concept of vindication is referred to by Kit Barker as the legal recognition of the claimant's rights affirmed by the provision of legal remedies such as awarding remedies, legal proceedings, striking out or ordering interlocutory applications and awarding costs, serve the vindicatory function of tort law. [1136] This basic sense, therefore, provides that all torts serve a vindicatory function and defamation and privacy torts may vindicate the protected interests of reputation and privacy through their legal provisions whether injunctive reliefs or monetary awards. [1137] An interlocutory injunction is an example of how the court vindicates the rights of the Claimant since such injunction prevents either the initial violation or further violations. [1138] In addition, monetary awards may vindicate the violated rights by reversing the effects of wrongdoing. The vindicatory reversing process could be achieved by compensatory damages that repair actual and future losses; or by a restitutive award that strips the undeserved gains from the defendant, who is then required to pay them to the wronged party, irrespective of whether a quantifiable loss or no loss was suffered by the latter. [1139] The specific nature or character of the loss suffered may largely determine the vindicatory effect of monetary awards. [1140] For example, if the claimant suffers an economic loss resulting from the defendant's breach of contractual obligation, a monetary award is an adequate remedy to compensate such loss and vindicate the claimant's interest.

[1136] Kit Barker, Private and public: the mixed concept of vindication in Stephen G.A. Pitel, Jason W. Neyers and Erika Chamberlain (eds) *Torts and private law in Orthodoxy* (Hart publishing 2013) 69; JNE Varuhas, 'the Concept of Vindication in the Law of Torts: Rights, Interests and Damages' (2014) 34 OJLS 253, 258; Normann Witzleb and Robyn Carroll, 'The Role of Vindication in Torts Damages' (2009) 17 Tort L Rev 16, 18
[1137] Witzleb & Carroll, ibid. 20.
[1138] Barker, ibid. 69.
[1139] Ibid. 74-5.
[1140] Witzleb and Carroll, ibid.

Conversely, the efficacy of such a remedy becomes questionable when the nature of loss relates to non-pecuniary losses, such as loss of dignity and reputation, since intangible harms are incommensurable with monetary awards. In this situation, vindication consequently becomes a dominant consideration in the assessment of damages. An award of nominal damages thus serves a primarily vindicatory purpose because it constitutes a publicly declaratory remedy considering the defendant to be a wrongdoer who acted in contravention of the claimant as right-holder. [1141]

Substantive damages may not only represent solatium measures, which provide the victim with appropriate consolation; but they may also be able to compensate economic losses as well as an appropriate declaratory judgement, which can achieve the primary vindicatory aim.[1142] This is why the vindicatory purpose within defamation is largely related to the size of substantive damages awarded in order to convince a bystander of the baselessness of the charge. [1143] In *Raj Dhir v Bronte Saddler,* Mr Justice Nicklin rejected unhesitatingly the defendant's plea that nominal damages were enough to vindicate the plaintiff's tarnished reputation, doing so on the grounds that such an award could send the wrong message to the public. Put bluntly, instead of informing bystanders that there was 'nothing in it', namely the falsity of defamatory allegations, they might indeed conclude that there was 'something in it'. [1144] The majority of observers, furthermore, would be more interested to know how much the claimant received, and drawn to this detail, rather than reading about the finer details relating to the court's judgment. [1145] Furthermore, the impossibility of knowing how extensive the impact of defamation has affected the plaintiff is

[1141] Witzleb and Carroll, (n 1137) 21-2.
[1142] Ibid. 23.
[1143] *Broome* (n 1005); *Easeman v Ford* [2016] EWHC 1576 (QB) [19].
[1144] (n 26) [111].
[1145] *Cairns* (n 1012) at 31

also one reason to preclude the nominal damages in defamation. [1146] However, there are some necessary caveats to be borne in mind when in assessing the scale of damages awarded for the declared purposes of vindication with regards to defamation. For example, in *Rahman v Ary Network Limited and ANR*, Eady J awarded damages of £185,000 in respect of libellous broadcasts on UK television made over the course of several years against the claimant, who was the chief executive of a group of media companies operating in Pakistan and the UK[1147]. Such large award sought largely 'to convince any fair-minded bystander of the baselessness of the charge'. [1148] However, Eady J affirmed that a published apology, a withdrawal, and/or a report in the newspaper drawing attention to the issues might constitute mitigating factors within the final decision around damages awarded, since such factors could achieve the chief objective of vindicating the claimant's reputation. [1149] Furthermore, the vindication purpose of damages may also be a less significant factor when the defendant makes an offer of amends which includes adequately demonstrating to the court and the interested public that the defendant has never contended that the allegations are true. [1150]

This vindicatory function of damages applied in defamation is a debatable subject in privacy law, since the monetary awards can never restore the lost privacy to its previous position as the case in defamation law. The first judicial attempt to situate the vindication concept within privacy law occurred in *Mosley v MGN*. There, Eady J recognised the need to

[1146] *Cooper* (n 331) [98]; *Flood v Times Newspapers Ltd.* [2013] EWHC 4075 (QB) [52].
[1147] [2016] EWHC 3110 (QB)
[1148] Ibid. [20].
[1149] Ibid. [18].
[1150] *Lisle-Mainwaring v Associated Newspapers Ltd* [2017] EWHC 543 (QB) in this case, Mr Parkes QC reduced general damages from £90 000 to a sum of £54 000 on the basis of the defendant's qualified offer of public amends. It was concerning the defendant's previous newspaper articles alleging that the claimant had reneged on commitments to make financial provision to the family of her late husband and had thereby betrayed her husband's trust.

vindicate the right to privacy in Article 8 ECHR. [1151] The vindication of privacy is achieved, from Eady J's perspective, by marking the infringement of privacy via identifying the defendant as the wrongdoer and the claimant as to the right holder. The right holder is entitled to adequate damages whose terms may include, but are not confined to, financial redress. However, unlike in defamation, there is no correlation between the vindication and the size of damages in privacy cases: 'If other factors mean that significant damages are to be awarded, in any event, the element of vindication does not need to be reflected in an even higher award'. [1152] The reasoning behind the judicial distinction made between privacy and defamation tort in respect of vindication is predicated upon a widespread judicial belief in the effectiveness of damages in vindicating a besmirched reputation and restoring it to its previous position, contrary to a keenly perceived absence of restorative efficacy relating to any awarding of damages within a privacy case damages. [1153] It is, therefore, logical to connect Eady J's application of vindication to Barker's conception of vindication that asserts the legal fact of a concrete right being violated and describes the status of litigants as right-holder(s) and wrongdoer(s) respectively. [1154]

Such distinction between defamation and privacy, however, was challenged since reputation and privacy share dignitary roots and nothing can restore them to the previous position. Rolph argues that it is baseless to apply different concepts of vindication in privacy and defamation contexts. [1155] He challenges the distinction of damages' objectives (as applied in *Mosley v MGN)* between privacy and defamation, which holds that damages are a strong vindictive form of a remedy capable of restoring, previously held esteem for the claimant.

[1151] *Mosley* (n 33) at 131.
[1152] *Ibid.* [216]
[1153] Ibid. [230].
[1154] Barker (n 1137) 69.
[1155] Rolph (n 880) 299.

Defamation tort is thus indistinguishable, in its generic restorative capacities and limitations, from other torts that are actionable *per se*. For example, there are false imprisonment or battery torts within which there is no need to prove the claimant's damage in order to establish a defendant's liability. These torts also share the fact that damages serve a remedial, rather than preventive, purpose. An award of damages can never prevent the infringement, nor can it restore the protected interest to its previous pre-defamatory position. [1156] According to this analysis, neither reputation nor privacy could be restored to their previous positions held prior to the wrongful publications. Damages, therefore, constitute in themselves an inadequate remedy for the vindication of protected interests, whether in defamation or privacy law.

Rolph consequently argues that the same considerations should be applied in awarding damages whether in defamation or privacy in respect to their shared vindicatory purpose. Firstly, defamation and privacy are actionable torts *per se* in which substantial damages should be awarded in order to reflect the importance and underlying values of these causes of action.[1157] Secondly, both torts protect non-economic interests in nature (dignitary interests) which are incommensurable with money. [1158] However, two challenges may face Rolph's argument that defamation and privacy as actionable torts *per se*. Firstly, the defamation tort is no more actionable *per se* since the defendant has to prove the impact of serious harm on her reputation in order to establish the defamatory meaning of allegation.[1159] Secondly, Jojo Mo challenges the recent judicial development of misuse of private information being recognised as a *tort* despite its equitable origin. Such a challenge is

[1156] Rolph (n 880) 301.
[1157] Ibid. 306
[1158] Ibid.
[1159] *Lachaux* (n 61)

predicated upon the inconsistency between the general constitutive elements of tort and the constitutive elements of misuse of private information. [1160] Mo argues that MOPI is based upon a test-exercise, the reasonable expectation of privacy test and the proportionality test, that may determine the outcome of the claim. However, a tort action is based on specific elements which the claimant needs to prove in order to compensate for that specified loss is within the suit. [1161] Mo believes that applying such a test would make the scope of MOPI open-ended to the extent that any private information could be misused even without publication.[1162] Mo thus argues the judicial expansion of torts realm to include the MOPI may result in bringing the uncertainty of these constitutive elements, as well as leading to overlapping with other actions once such a reasonable expectation test was satisfied. [1163]

Nevertheless, Mo's challenge of the tortious nature of MOPI may be deemed untenable for the following reasons: firstly, the mere existence of tests could not create a basis to deny the tortious nature of any wrongful interference with the Claimant's privacy. For example, defamation also includes different tests such as defamatory meaning tests [1164] and the proportionality test. [1165] Such tests in themselves did not challenge the tortious nature of defamation. Secondly, the most recent developments around privacy protection within English law may demonstrate the birth of a general tort of privacy or tort of misuse of private information, including the formulation of disclosure and intrusion conducts. [1166] Finally, MOPI constitutes an actionable tort *per se,* since a loss of privacy itself constitutes a

[1160] Mo, (n 5) 92.
[1161] Ibid. 92-3.
[1162] Ibid. 93.
[1163] Ibid. 94.
[1164] A statement is defamatory if it would tend to lower the claimant in the estimation of right-thinking members of society generally or if it leads the Claimant to be shunned or avoided or if it would expose her to be hatred, contempt or ridicule. Mullis & Parkes (n 26).
[1165] *Flood* (n 1151) at [215 & 216].
[1166] *Cliff Richard* (n 312) [337, 416]; *NT1* (n 1090) [42].

real loss and the claimant suffers a real diminution of the right as a 'good thing' caused by the wrongful interference. [1167] In other words, every violation of a protected interest, irrespective of its financial or emotional consequences, may be counted as a real loss that should be consequently be redressed by those substantial damages that retain a dual function in all such cases. In other words, substantial damages seek to compensate for the real loss of privacy as well as indirectly serve a vindicatory purpose. [1168] Thus, it is well argued that the primary purpose of damages awarded in torts actionable *per se* is to vindicate the protected interest. [1169]

Besides the size of damages awarded in defamation, the verdict in the claimant's favour clearly retains a crucial role in vindicating their reputation as Lord Bingham explained in *Jameel and Another v Wall Street Journal Europe* 'By a successful action the injured reputation is vindicated. The ordinary means of vindication is by the verdict of a judge or jury and an award of damages'. [1170] The real injury in defamation, as Varuhas argues, is not the reputational injury, but the objective fact of being publicly defamed. This explains the palpable increase in damages awarded within defamation suits to vindicate the claimant's good name, as 'quantum must be sufficient to convince a reasonable bystander that the statements made about him were baseless'. [1171] The publicity of the judgement could also vindicate the claimant's reputation since such publicity attracted by the judge's reasoning

[1167] Descheemaeker (n 1056) 301

[1168] Ibid. 303; Varuhas also believes that privacy is an actionable tort *per se* because the consequential loss is not a prerequisite element to bring the claim, but the mere interference with the protected interest constitutes a real head of loss. Varuhas (n 1044).

[1169] *Gulati,* (n 312) [48]; Varuhas (1141) 253.

[1170] (n 644) [24] Lord Bingham of Cornhill emphasised; Similarly, in *Kiam v. MGN* [2002] EWCA Civ 43 [72] Sedley J stated that 'the vindication of the Claimant's reputation is the principal function of the verdict itself'. ; *Greene* (n 836) [72].

[1171] Varuhas (1141) 277.

could modify the perception of the defamed person held by the public. [1172] The vindication concept in defamation law aims to clear the claimant's besmirched public reputation and the unfounded pejorative associations pertaining to their character that the defendant's own defamatory conduct has temporarily produced. The adherence to the vindication concept plays a central role in ensuring that judicial assessment of compensatory damages continues to adequately fulfil that aspect of its overall function involving the drawing of the public community's attention towards the wrongfulness and falsity of the defamatory imputations in order to restore the claimant's reputation. [1173]

Clearly, however, an award of damages may not always effectively fulfil this latter function. Witzleb and Carroll argue that alternative remedies could correct more quickly and directly the public record such as retracting false statements, publishing corrections or issuing an apology. [1174] In other words, the predominant judicial belief pertaining to the efficacy of monetary awards with functions including the vindication of tarnished reputations is clearly grounded within what might be characterised as the historical residue of monetary awards' traditional primacy within common law actions. [1175] The non-monetary awards such as a swift correction of the public record or the libel action itself may frequently constitute the most efficacious means of providing victims with justice, through an adequate restoration of their social status, public response to defamation, and significant vindication. [1176] In contrast, evidence suggests financial gain does not constitute the main concern for a significant number

[1172] Rolph (n 830) 296.
[1173] Witzleb and Carroll, (n 1137) 35
[1174] Ibid. 21.
[1175] Robyn Carroll and Normann Witzleb, 'It's Not Just About the Money'- Enhancing the Vindicatory Effect of Private Law Remedies' (2011) 37 Monash university law review, 216, 226.
[1176] Carroll and Witzleb (n 1180).

of claimants in matters where their personal interests such as dignity and reputation were infringed. [1177]

Based on this analysis, further support for the application of similar considerations relating to vindicatory purpose when assessing damages in privacy and defamation might be found in a recent case where the right to make a statement in open court in order to vindicate the claimant's rights was upheld and defined as a principle. In *Sarah Lynette Webb v Lewis Silkin LLP*, [1178] Mr Justice Nugee held that the principles governing statements in open court should be applied with 'equal vigour' to defamation and privacy cases alike. The claimant applied to make a statement in open court under Civil Procedure Rules 1998 (CPR) 53PD.6.1(4) subsequent to her acceptance of the defendant's offer to settle her misuse of private information action in respect of an unjustified, albeit limited, access to the claimant's email. The claimant's application was made in order to vindicate her position and to explain publicly the reason for bringing the action, the hurtful distress suffered by the violation and her perception of the settlement. This was upheld as serving the same purpose, and pertaining to a consideration of equivalent claimant rights, as the established right to make a statement in open court is already applied within defamation proceedings. [1179] The defendant objected to the establishment of such a similarity on the grounds that the claimant's right to make a public statement in defamation seeks to correct the falsity of the defamatory allegations against her; whereas the right to privacy cannot be vindicated in an analogous manner by making a public statement in open court, since very few people have accessed to the private information. [1180] The judge nevertheless accepted the claimant's argument that

[1177] Ibid. 225.
[1178] [2016] EWHC 1225 (Ch)
[1179] Ibid, [34].
[1180] *Sarah Lynette Webb* (n 1183) [35].

the same considerations applied in defamation should also be applied in privacy law, because such statements enable more publicity to vindicate the claimant's privacy. [1181] The court found the different nature of protected interests in defamation and privacy and the wide publicity of information in question are irrelevant factors or considerations when ordering a public statement to vindicate the claimant's rights. The key concern was the fact of infringement of her rights and its hurtful effects, for which infringement the right to court testimony would serve as partial, if not full, vindication. [1182]

C- The impact of overlap on accumulating damages awarded in defamation and privacy law

As explained in the previous section, there are different types of damages that can be awarded in the defamation and privacy torts. The task of this subsection is to examine to what extent such damages could be cumulative or alternative. An election between alternative remedies seeks to avoid double compensation for the same loss since the aim of remedies is to make the harmed party whole no more and no less. [1183] This rationale should prevail not only in respect of alternative remedies triggered by the same wrong under one cause of action but, also in respect of two causes of action triggered by the same wrong even though both causes of action have different constitutive elements. [1184] There would be a double recovery if a claimant was awarded compensatory damages for a breach of duty of reasonable care under a negligence claim, and a breach of reasonable care and skill under a contract for services, since such awards redress the same loss caused by the same wrongful act even the constitutive elements of such claims are different. [1185] This rationale solely governs cumulative actions based on a single set of facts causing a similar loss to the claimant, or

[1181] Ibid, [38].
[1182] Ibid, [39].
[1183] Marshall & Lister (n 406) 294.
[1184] Ibid. 295.
[1185] Marshall & Lister, ibid.

similar gain to the Defendant, irrespective of whether there are different evidential thresholds to establish liability under each cause of action.

In English law, the defamation and MOPI are cumulative causes of action, namely both actions could be brought simultaneously in respect of the same set of facts. [1186] For example, in *Cooper v Terrell*, Matthew Cooper, an Executive Chairman and a director of Imaginatik Plc Company, brought two actions of libel and MOPI against Mark Turrell in respect of Turrell's having published private and defamatory information obtained by means of unauthorised and secret audio recording. [1187] Both claims were partly concerned with the publication, specifically, of false private and defamatory information related to the claimant's medical conditions. [1188] Such an overlap did not affect the claimant's right to bring both cumulative causes of action of defamation and privacy. Tugendhat J identified the damage addressed by compensatory damages to the emotional distress suffered by the claimant in respect of the true information disclosed to the claimant's solicitor, along with the false information related to the claimant's health and his alleged unfitness to conduct his professional duties. [1189]

It is worth mentioning that the judge awarded no damages for the fact that the disclosed information had been obtained through unauthorised and secret audio recordings.

[1186] *Applause Store Productions Ltd* (n 26) in this case, two actions (libel and MOPI) were brought in respect of the Defendant's creation of a false profile on social media site Facebook containing defamatory and private information; the judge refuses the plea that both actions have to be separately treated because there is no overlap between the information in question. Richard Parkes QC assessed privacy damages on the light of damages awarded in libel action because 'It is likely in reality that most publishees will have seen both publications - probably the profile first, followed by the group page, after clicking on the link to the group. I do not think it would be right for me to treat the privacy claim as if it was entirely free-standing; nor do I believe that it would be right for me to award aggravated damages under both heads. It is necessary to take a global view'. The judge awarded a modest sum of £2000 for MOPI claim and £15000 for a libel claim.
[1187] (n 331) [2].
[1188] Ibid. [103].
[1189] *Cooper* (n 331) [102].

[1190] In the separate libel claim, Tugendhat J also identified those losses recovered through general damages awarded in respect of the defamatory publication (in this case, of medical information) and the damages of libel were thus awarded specifically to act as reparations for the Claimant's harms to reputation as well as to feelings. [1191] The sum awarded was deliberately substantial in what Justice Tugendhat intended to constitute a vindication of the Claimant's besmirched reputation. [1192]

In comparing the harms considered in both claims, one may observe that emotional distress is made recoverable in both actions, and hence postulate that such recovery may amount to double compensation. This is because such harms were, after all, to feelings caused by the publication of the same false, private and defamatory information related to the claimant's health. Therefore, Tugendhat J's reduction of the quantity of privacy damages from £40,000 to £30,000 may be thus read as an attempt to avoid double counting with regards to redress of loss pertaining to that emotional distress. [1193] However, one may also enquire what different measures of judgement might have arisen had Tugendhat J applied that new approach to awarding damages.

Gulati v MGN evidences that the mere unauthorised intrusion into one's private life represents a real harm of diminution of the claimant's right to control formerly private information. [1194] In this case, Mann J awarded a cumulative total of £1.2m to 9 claimants who were subject to a widespread, institutional and longstanding phone-hacking campaign. [1195]

[1190] Whereas the new approach of privacy damages awards applied by Mann J takes into consideration the mere factual intrusion of phone-hacking. *Gulati,* (n 312).
[1191] *Cooper*, ibid. [98-9].
[1192] Ibid. [98].
[1193] Ibid. [107].
[1194] *Gulati,* (n 312) [48].
[1195] Ibid. [209].

These very substantial damages were awarded under four different categories: [1196] hacking,[1197] private investigators/blagging,[1198] published articles containing private information. [1199] If Tugendhat J applied Mann J's approach, that which was evidenced within Gulati, Mr Cooper would be awarded three categories of damages: an award for unauthorised and secret audio recording; an award for the mere misuse of private information (publication); and an award for the general distress caused. In such a hypothetical scenario, only the damages of general distress would be non-cumulative, since if they were to be awarded in both overlapping claims then this would constitute a double counting of the same injury (injury to feelings). By contrast, the awards for the secret recording and the publication of private information would be cumulative, with the award pertaining to both separate injuries being granted in response to injuries adjudged to were sustained through the same wrongful conduct on the part of the defendant. The reason for such accumulation is the fact that the claimant suffered two different harms related to two protected interests: an injury to reputation, caused by the dissemination of defamatory information, and an injury to privacy caused by the secret recording and publication of private information. [1200]

Such an accumulation creates no double counting, simply because the losses covered by these awards are distinct (reputation and privacy). However, if Mr Cooper had been

[1196] The Court of Appeal held that it is a matter for the exercise of judicial discretion to choose a global award or separate awards for invasions of privacy. Ibid.

[1197] 'Hacking is the process whereby a person, who has no authority to do so, accesses voice messages left on another's phone if the owner of the phone has not protected his voicemail box by a personal identification number ("PIN") or has done so by a PIN which was easy to decode'. *Gulati,* (n 312) [4].

[1198] 'Private investigators were also given the task of finding out the telephone numbers of people whom the newspaper had identified as targets for their hacking or their phone and credit card bills and medical information. This information was sometimes obtained by "blagging": that is, by the investigator pretending to be a third party, such as a telephone services supplier, that he was the particular person or was, say, an aide to that person and authorised to obtain the desired information, or persuading them to part with the information by some other pretence'. *Gulati*, ibid. [6].

[1199] Ibid. [234-701].

[1200] Keren-Paz (n 416) 74; Marshall & Lister (n 406) 293.

awarded damages for general distress under both claims, this would clearly be a double recovery, since the same distress loss caused by the same wrongful conduct was recovered under two different actions. Hence, one may deduce from this breakdown of what constitutes legitimate and what constitutes double-counted injury claims, the reasoning behind Tugendhat J's reduction of the MOPI award from £40000 to £30000. By this chapter's reading of the law, Tugendhat judged the distress-related loss caused by the publication of private medical information to be already covered under libel action. [1201] However, Eric Descheemaeker argues that this current approach of combining damages to reputation or privacy harms with emotional distress harms may represent a double recovery whether according to the bipolar model and unipolar model. [1202] The Bipolar model requires two existing elements constituting a tortious cause of action: an identifiable instance of wrongful conduct which violates the Claimant's right as defined under the law; and a distinct loss causatively emergent from this initial wrong. [1203] According to this model, the harm is an independent and distinct element from its causative wrong. Such an element assumes a pivotal role in providing claimants with valid grounds for a successful tortious claim against the wrongdoer, given that the law seeks to redress not the wrong itself but the consequential loss of that wrong. [1204] The mere existence of the wrong is insufficient to grant compensatory damages unless a subsequent loss, whether pecuniary or non-pecuniary, may be identified as present and causally linked, in an evidentiary sense, to that wrong. [1205]

[1201] *Cooper* (n 331) [107].
[1202] Descheemaeker (n 1056) 287; Eric Descheemaeke, 'Claimant-Focused Damages in the Law of Privacy' in Jason Varuhas & Nicole Moreham (eds) Remedies for Breach of Privacy, (Hart Publishing 2018) 150.
[1203] Descheemaeker (n 1056) 288.
[1204] Descheemaeker (n 1005); Descheemaeker (n 1203)
[1205] Ibid. 291.

The unipolar model, by contrast, identifies the harm as the violation of the right itself that merge and collapse onto another. [1206] In this instance, a wrongful violation of the claimant's right constitutes the claimant's harm that may thus be technically defined as the diminution of the protected interest. This model, unlike the bipolar model, allows for the granting of substantial damages even though no factual harms were suffered. [1207] Further consequential harms should be compensated under another cause of action, since they represent independent wrongs. These wrongs constitute distinct violations of different rights; thus, an economic loss represents a violation of wealth interests, whilst mental distress is a loss relating to some violation of a Claimant's well-being. [1208]

Hypothetically, mixing both models simultaneously compensates the pure and consequential harms under one cause of action, would amount to an instance of *double recovery* since the same injury would be compensated twice. If the claimant were to receive compensation for her pure injury and another set of compensation for consequential losses as these emerge directly from the same initial wrong, such recovery would be double-counted for the same wrong. [1209] In analysing the current approach of damages awarded in defamation law, Descheemaeker believes that compensating the defamed person for her reputational injury and her emotional distress amounts to a *double counting,* because the same injury is looked at and compensated twice. In the context of privacy, the *pure harm* of privacy (diminution of privacy rights) according to the bipolar model must be unrecoverable; but only those *consequential losses*, stemming from the wrongful interference being made public (which could be pecuniary or non-pecuniary or both) qualify as grounds for assessment and

[1206] Ibid.
[1207] Ibid.
[1208] Ibid. 292-3.
[1209] Ibid. 293-4.

award of damages under the law. [1210] The unipolar model, by contrast, allows only for the recovery of harms relating to the breach of privacy rights, namely the diminution of the right to privacy, and such a recovery may thus indirectly compensate both economic and mental losses and injuries. [1211] The combination of both models would constitute an objectionable approach since it hypothetically permits the law to *double count* the harms at the same time. The law should compensate either the pure loss of privacy, which indirectly considers the consequential losses, or those consequential losses that indirectly blot out the breach of privacy itself. [1212]

With respect to Descheemaeker' deeply analytical arguments, it might be, however, inappropriate to reduce the actual approach applied in awarding damages in defamation and privacy to a double-counting because they constitute not one loss to be compensated twice, but two substantially different losses. Analytically, a loss of privacy or a loss of reputation is intrinsically distinct and independent from the loss relating to degrees of emotional distress. Furthermore, the actual approach followed could be justified by the absence of independent causes of action established within English law that directly recognise well-being or happiness as protected rights. Therefore, applying one single model might lead the injured party worse-off without having a legal recourse to achieve satisfaction for her injury.[1213] Moreover, Descheemaeker's argument requiring the recognition new causes of action to redress the emotional distress harms may increase the inefficiency of civil procedure law, since it would increase the costs of adjudicative system caused by bringing two causes of action instead of one. Finally, the actual approach applied in defamation and privacy corresponds closely to

[1210] Descheemaeker (n 1056) 295.
[1211] Descheemaeker (n 1207).
[1212] Ibid.
[1213] Ibid.; Descheemaeker (n 1056) 297

the core aim of tort law seeking to place the wronged party in the nearest position to the wrong not having occurred in the first place. [1214] The relationship between compensatory and non-compensatory damages awarded in defamation and privacy might be alternative on one hand and cumulative on the other hand. English law has a settled rule that compensatory and gain-based damages are alternative remedies; that is, no accumulation of such damages is permissible should both remedies arise in respect of the same wrongful act, and the claimant is therefore required in such circumstances to make an 'election' between them. [1215]

There are two rationales explaining why these damages are alternative and inconsistent: the ratification principle and balancing principle. [1216] The ratification principle is based on a hypothesis that the defendant had acted as an agent to make a profit on behalf of the claimant. Thus, the election of an account of profit hypothetically implies a ratification of the defendant's wrong in order to ratify that legitimate profit had been made on behalf of, and was owed to, the claimant. That is to say, no loss had been caused because no wrong had been committed in the first place, and consequently no compensatory damages could be awarded in parallel with such an account of profit. [1217] The alternative explanation as to why it is inconsistent to award compensatory and gain-based damages in respect of the same wrong is based on the theory of Balance. The balancing principle suggests that the defendant's gain on one hand and the Claimant's loss, on the other hand, are both fluid and correlated concepts; thus, each amount awarded to compensate (and thus reduce) the claimant's loss necessarily leads to an equal proportionate reduction of the defendant's gain,

[1214] Robert Stevens, Rights and other things in Donal Nolan and Andrew Robertson (eds) *Rights and Private Law* (Hart Publishing 2011) 136.
[1215] Edelman, (n 405); Marshall & Lister (n 406) 291.
[1216] Marshall and Lister, ibid. 291.
[1217] This rationale is called also the waiver of tort theory. See: Marshall & Lister (n 406); *United Australia Bank v Barclays Bank Ltd* [1941] AC 1; Stephen Watterson, 'Alternative and cumulative remedies: what is the difference? (2003) 11 R.L. R. 10, 1215

as it is deemed to have occurred through the same wrong. [1218] However, it may, potentially, be conceivable to claim and accumulate alternative and inconsistent remedies of compensatory and gain-based damages for each cause of action, since the losses pertaining to reputation and privacy in defamation and MOPI each constitute distinct consequences. Thus, the claimant might claim an account of profits for the latter and compensatory damages for the former even though both causes of action emerge from the same wrongful conduct. [1219] The accumulation of restitution and compensation plays a significant role in vindicating the claimant's protected interests as these are held to be wrongfully and unjustifiably breached, and to effectively deter the defendant from future commercial exploitation of individuals' personal rights. [1220]

By contrast, the relationship between compensatory and exemplary damages is consistent and consequently cumulative, despite exemplary damages being one type of non-compensatory damage. This is because each remedy has its own legitimate remedial aim, consistent with the aim of other remedies; thus, there is no logical reason to prevent the claimant from achieving both legitimate aims simultaneously. [1221] It is well established in English law that there is no structural contradiction between the award of compensatory and exemplary damages since their aims are clearly consistent. They compensate the claimant's loss through the former, whilst punishing and deterring the defendant via the latter. However, the identification, by the court, of available compensatory damages as inadequate to the fulfilment of their remedial function in punishing and deterring the defendant's respective past and future conduct, and thus constitutes the occasion upon which exemplary damages

[1218] Andrew Burrows, *Understanding the law of obligations,* (Hart Publishing 1998) 43-4; Birks, P, 'Inconsistency between compensation and restitution' (1996) 112 LQR 375 cited in Marshall & Lister, ibid. 292.
[1219] Marshall & Lister, ibid. 293.
[1220] Keren-Paz (418) 74-5; Hartshorne (1015) 82-3.
[1221] Watterson (n 1222) 15.

might be awarded. Such compensatory damages may themselves otherwise indirectly achieve the purpose of exemplary damages to punish and deter the defendant. [1222]

7. 4: Concluding remarks

This Chapter has examined the impact of the overlap on damages in order to assess how the relationship between interests in privacy and reputation could affect the relative size of damages given in these areas. In the course of doing so, the chapter has examined the appropriate measure of damages in overlapping cases within three correlated issues: the legitimacy of including reputational harms within privacy law's scope of damages; the awarding of damages in order to vindicate any right to privacy; and the accumulation of defamation and privacy damages. This procedure naturally requires considerations of the size and purpose of compensatory and non-compensatory damages awarded in defamation and privacy law respectively, which discussion can be found present here. The chapter has classified the compensatory damages under three categories: compensatory damages for pure losses; compensatory damages for consequential losses, and compensatory aggravated damages. Conversely, the non-compensatory damages are comprised of exemplary damages and gain based damages, as discussed within the relevant subsection. Such considerations were found to be important: firstly, in terms of explaining the differences of damages awarded in defamation and privacy; and secondly, the justifications for such differences.

Given the protection of reputation is the shared function of defamation and privacy, there would be crucial incentives to include reputation within the elements of damages in privacy law and these can be found in both an economic analysis of civil procedures perspective. If the court considers that reputational harms come within the elements of

[1222] Ibid. 16.

damages in privacy, this might be an efficient way to minimise the judicial costs of litigations, since the claimant, practically speaking, would have little benefits of bring defamation proceedings to redress her loss of reputation. Furthermore, there could be unjustified injustice towards the victims who suffer reputational harms caused by serious invasions of privacy if reputational harms were exclusively protected by defamation law. This is because not all invasions of privacy could satisfy the tests of defamation which may change over time– such as the changing shift in attitudes towards allegations of homosexuality. Secondly, it is the contention of this thesis that the role of vindication in defamation and privacy depends on the definition of the concept of vindication itself. In doing so, all remedies of defamation and privacy, whether injunctive or monetary, involve vindicatory purpose if the vindication means the legal recognition of rights. Defamation and privacy may also share the same function of vindication by describing the status of litigants as right holders and wrongdoers. Taking into account judicial and academic views, this thesis concluded that the traditional primacy of the historical residue of monetary awards within common law actions is the main tool to vindicate reputational interest. Thirdly and finally, the thesis provided a detailed explanation of the relationship between damages awarded in defamation and privacy and how, theoretically speaking, there would be double compensation in accumulating these damages. Regarding the compensatory damages, there could be a double compensation if emotional harms were compensated under defamation and MOPI actions brought in respect to the same set of facts – since they address the same interest. The compensatory damages awarded to redress the harms to reputation and privacy are cumulative, since such interests are distinct and independent in English law, even if they could substantively overlap.

Chapter 8: Conclusion

This thesis has substantively tackled the overlap between defamation and privacy torts, and the main implications resulting from such overlap.[1223] It has furthered the analysis by using a multi-perspectival approach to decide the best solution to the questions examined in this study. This incorporated local coherence, efficiency, feminist analysis, access to justice and distributive justice perspectives respectively. Its research enquiry was grounded within examining this conceptual tort overlap and to what extent it is or can be, as many scholars argue, avoidable. In other words, it has critically analysed the arguments advanced to oppose the judicial recognition of false privacy which represents the core of such an overlap. This thesis has deeply analysed the impacts of this overlap upon defences, interim injunction and damages. Regarding the defences, it has examined to what extent the defences of defamation could be applied in privacy, and to what extent such defences could be harmonised with privacy law. With respect to the impact upon interim injunction, this thesis has analysed to what extent the restrictive rule of *Bonnard v Perryman* as applied within defamation cases should also be applied in privacy cases in the case of overlap. Finally, this thesis has examined the impact of the overlap upon damages in order to assess how the relationship between interests in privacy and reputation ought to affect the relative size of damages given in these areas. The following sections provide the outcomes of this research accompanied by the key-arguments justifying these outcomes.

[1223] This thesis has also identified further implications which could be a subject matter for future research. Please see section 6 in this chapter (Recommendations for future research).

8. 1: The conceptualisation of the overlap between defamation and privacy

This thesis found that the overlap between defamation and privacy torts, in contrast to many scholars' arguments, cannot be avoided due to the intertwined relationship between the concepts of private life and reputation respectively protected under the English torts of privacy and defamation. This conclusion was arrived at in light of its examination of theoretical foundations of both torts as well those of the Strasbourg jurisprudence; specifically, these concern the conceptual and doctrinal relationships between the interests of privacy and reputation. The accounts which have been provided around dignity and general personality right potentially provide explanatory justifications for bringing simultaneously two different claims in respect to a single harmful publication. Publications in this context refer to voluntary, lawful, personal and defamatory information related to sexual, financial, or medical matters that may together undermine personal reputation and private life. Information relating to involuntary misfortune such as a disease could likely undermine the claimant's privacy more than her reputation because there would be a difficulty in placing upon the claimant a direct moral responsibility. Information relating to truly unlawful conducts are likely excluded from the scope of the overlap because neither privacy nor defamation claims could succeed due to the public interest exception.

The study has illustrated how determination of those dignitary interests, applied to reputation and privacy, may feasibly provide an objective explanation of the correlation between defamation and privacy torts. The reputational harms, which undermine the esteem held by the society towards an individual may also concomitantly undermine the individual self-esteem. Similarly, the general personality account provided explains how harming the reputational aspect associated with the personality right may also undermine the privacy aspect. Based on this account, the multi-faceted personality right of Article 8 ECHR contains

an overlapping relationship between concepts which encompasses privacy, reputation, informational self-determination, and one's own image rights. The sociality-based account, by contrast, offers a conceptual basis for explaining how reputational harms may consequently undermine the right to private life. The pain of social rejection caused by the breaking of social ties (loss of sociality or reputation) constitutes a consequent harm to the individual's integrity (privacy), especially when such social bonds consist of strong ties such as family and friends. This account may explain the relationship between the interests of reputation and private life within Strasbourg jurisprudence as these require reputational harms to demonstrate a certain level of damage towards private life.

8. 2: False privacy (false private information)

The thesis found that the arguments advanced to preclude falsity from the scope of privacy do not stand on solid grounds. It argued that the equitable action of breach of confidence may support the protection of false information under the MOPI action on the grounds that there is no inconsistency between the confidential/private nature of the information in question and the falsity of such information. The factual absence of equitable actions of confidence brought in respect of false information may not provide solid grounds for definitively excluding falsehoods from its protective remit. There would be no reason in principle for preventing the bringing of confidentiality actions concerning unauthorised dissemination of false confidential information. On this basis, the legal authority *Tchenguiz and Ors v Imerman* [1224] may support the protection of falsity within the remit of MOPI action since confidentiality and privacy claims should be developed consistently and coherently irrespective of their different features. Furthermore, the argument behind distinguishing the

[1224] [2010] EWCA Civ 908, [2010] WLR (D) 217, [2010] 2 FLR 814

claims of defamation and privacy on the basis of the dichotomy of falsity and truth has been shown to be potentially untenable and at worst misleading. Falsity, the thesis has demonstrated, is not the pivotal point in defamation law, given that the claimant in English jurisdiction, contrary to American jurisdiction, is not required to prove the falsity of defamatory allegations. The touchstone of defamation law is whether the information is libellous, and the issue of falsity is in fact a matter of legal presumption that could be defeated by establishing the truth defence. The defendant may not be liable under defamation law, even in the event of a publication being defamatory and false, if she could establish other defences predicated upon the absence of malice such as POMOPI or qualified privileges. Similarly, the nature of the information constitutes the decisive factor when including or excluding it from the protective remit of MOPI since the touchstone of *privacy* is whether the information is private and not whether it is true or false. Based on this premise, there is no logical reason for distinguishing private information on the basis of the dichotomy of truth and falsity when deciding its actionability under MOPI. Thus, it is fundamentally wrong to equate the overlap between defamation and privacy merely around the falsity of information if such information, objectively speaking, were not simultaneously defamatory and private. The overlap between defamation and privacy, as this thesis emphasised, goes beyond the issue of falsity because the nature of the information is a subject of objective criteria (tests). This means that once the information in question satisfies the tests of defamation and privacy, there would be an unavoidable overlap between such torts. Accordingly, the arguments advanced by scholars to avoid the overlap are groundless since mere falsity cannot satisfy defamatory tests, where similarly the mere truth of information cannot successfully engage the reasonable expectation of privacy. Put differently, the fact that a piece of information is true cannot prevent it from being defamatory since the defamatory meaning

of such information depends on applying objective tests of defamation law. Equivalently, the fact that the information is false cannot prevent it from being private since determining the private nature of information is predicated upon reasonable expectation of the privacy test. Ergo, the overlap may occur if information were private and defamatory at once, irrespective of whether such information were true or false. However, this overlap would be accurate only in respect to *false private and defamatory* information since truth is a complete defence in defamation but not in privacy.

This thesis advanced a variety of arguments that support the inclusion of false private information within the protective remit of MOPI. It began with the local coherence argument that requires a focus on consistency of a specific field of law rather than the whole legal system. The coherence of privacy law requires the protection of information irrespective of its accuracy or inaccuracy once such information is private. In addition, the division between true and false information could undermine the privacy law itself, because it is, logically speaking, methodologically inconsistent to protect an individual's privacy through forcing her to reveal which information is true and which false; such forced revelations may cause further intrusion and infringement upon the right to privacy itself. Furthermore, there is no principled reason to retain the coherence of the defamation law on the grounds that coherence of privacy/MOPI is undermined, especially with the knowledge that MOPI action directly addresses the core of privacy protected under the Article 8 ECHR.

The economic analysis provides a further argument for including falsehood within privacy law, since allocating false private information within the remit of defamation law would inefficiently increase the social costs of the publication. The claim that defamation law should protect false private information potentially incentivizes publication of falsehoods due

to the externalisation of liability costs relating to such non-defamatory information under libel law. The ensuing increase of falsehoods in the market would not only harm those directly subject to the claims made within such publications also the public; that is, it would adversely affect public trust in the media in the long term. As discussed, the reduction of the public's confidence in the free press would consequently undermine the media's function to observe and expose public figures' wrongdoings. Relatively few persons would be inclined to trust the accuracy of press' publications, and there might be concomitant incentives for public figures to engage in wrongdoing. Such harmful ramifications, whether in respect to the primarily loss of privacy caused by the intrusive publication, or the subsequent loss of the public's confidence in the media, that outweigh the short-term benefits of unfettered freedom of expression. Relying on defamation law as the only legal mechanism to mitigate against the flow of false information could create an inefficient outcome within the media market in the long term because defamation law could increase the flow of false but non-defamatory information. The framework of False privacy, by contrast, may have little negative influence, and indeed achieve a net positive regard to freedom of expression since the dissemination of false information without legal liability adversely affects public trust in the press and its role in a democratic society. Based on such analysis, the formulation of false privacy action may help to promote freedom of expression because it might lessen the degree of irresponsible, unfair, and sensational publications involving inaccurate and harmful information that consequently compromise media credibility amongst the public.

This thesis argues that allocating falsehoods within the scope of defamation law would inflict injustice on the victims, since false publications could seriously harm their dignity, autonomy and control over the dissemination of private information, but could not be actionable under defamation law. The new interpretation of the Supreme Court decision in

respect of the requirements underpinning recognition of serious harm is 'that it not only raises the threshold of seriousness …. but requires its application to be determined by reference to the actual facts about its impact and not just to the meaning of the words'. [1225] This means that the victims of unauthorised publication of false private information may not be able to get adequate protection from seriously harmful publications if no serious harm to their reputation is determinable as having been formally caused. The serious harm requirement may, under privacy law, protect individuals from claims that include false information since it is difficult to bring defamation action if the information is not deemed harmful enough to qualify as breach of reputational interest.

As discussed, the claim that false private information must be protected only by defamation law is highly objectionable from the feminist analysis perspective; defamation law may allow the commodification of the individual through harmfully manipulating access to their private information – without providing the female victims a legal recourse outside of that made available through the limited scope of defamation. The unauthorised publication of false private information may undermine the individual's/woman's control over their private information; such control in turn cannot be separated from the concept of autonomy. This thesis argues that the feminist analysis provides additional support to its central claim that false private information should be protected by privacy law: defamation law would create and reproduce relationships which feminist theory analyses as subordinate because only strictly defamatory information may be protected within the scope of defamation law. The contention that false private information should be protected by privacy law, as this thesis emphasised, would not only provide the victims with a relatively adequate protection

[1225] *Lachaux* (n 61) [12].

from or remedy for the unjustified harms, but could concomitantly provide female victims with a real protection of their privacy rights. Concretely speaking, this protection could be enacted via granting injunctive relief under privacy law – which would be particularly beneficial to female victims because of the limited efficacy of damages in the era of technology. Conversely, such relief has limited availability in defamation law. Such a course of redress would also increase access to justice, since injunctive relief could not only decrease the legal costs of bringing actions in order to remove the private material from the public domain (for instance, from internet websites and social media) and prevent dissemination via publication, but may also reduce further harms that could be caused by the trial proceedings.

US false light tort provides a significant insight in terms of corroborating the fundamental claims within this thesis regarding protection of false information within the privacy remit. Specifically, the doctrinal or conceptual justifications of US American false light tort, as emphasised, provides further arguments to support the current approach of English law. Defamation law, doctrinally speaking, is unable to include all harmfully false information since its protective scope covers only defamatory materials. The removal of false light and false privacy as argued in Chapter 5 in accordance with substantial scholarly literature, [1226] would end up with two undesirable results. Firstly, it would cause injustice towards the victims of false and highly offensive/private publications, especially in the era of technology, since there would be no remedy under the defamation law in the event of such publication not being defamatory. Secondly and most importantly, it would distort the doctrines of defamation law itself because the court, in order to justify remedies for harms caused by

[1226] See s. 3 A in chapter 5.

highly offensive but non-disparaging falsehoods, might overly-extend the concept of defamation.[1227] In other words, there would be distorted tests of defamation in the course of defamatory allegations around what in reality constitutes a breach of privacy. In addition to this, what is considered defamatory fluctuates over time, as defamatory tests are based on social reactions towards the victims of false allegations. [1228] This may further challenge the doctrinal capacity of defamation law to cover false private information because the definition of defamation changes over time.

False light may provide, as this thesis argued, convincing explanations for how the dissemination of false information potentially undermines the right to privacy. The dissemination of false highly offensive/private information may either force people to withdraw from society or force the victims of false information to confront misleading images of themselves. Under each option, an individual's self-determination would be undermined, which may lead individuals to thwart the free exchange of ideas as well as chilling the formulation of decisions and choices taken on the basis of an independent and critical thinking that privacy seeks to promote. On such a basis, the dissemination of harmful falsehoods may interfere with the right to privacy, given that such falsehoods potentially undermine individual desires to withdraw from public observation or to be secluded and free from unwelcome scrutiny of their private life. Furthermore, actions falling under false light may provide redress for unwanted interferences with rights to privacy on the grounds that the unauthorised dissemination of falsehoods undermine an individual's ability to control the dissemination of private information, which may further result in an individual being forced

[1227] See s. 2 C & D in chapter 4.
[1228] See chapter 4.

to make public private facts they would rather keep private in order to refute such falsehoods.

8. 3: Defences

This thesis used different perspectives to examine the consequences of borrowing the defamation defences of qualified privileges and POMOPI and transposing these to territory of privacy in the event of both torts overlap. From the local coherence perspective, there would occur undesirable inconsistency if privacy law were to allow application of defences initially requiring the defendant not to have malicious intent behind publishing the information. This means that the defendant must believe in the truth of the information to successfully plead defences of honest opinion, qualified privileges and POMOPI. This undesirable inconsistency caused by applying such defences in privacy law derives from juxtaposing the requirement of belief in truth alongside the fact that truth itself is not a defence in privacy. Consideration of distributive justice theory provided significant insight with regards to the question of applying POMOPI defences in privacy: the section in question it examined the distribution of benefits and burdens of applying such defences that would change standards of liability within privacy from strict liability to negligence. By applying fairness and the loss spreading criteria, there would arise undesirable outcomes on the part of the victims of intrusive publications in general and in particular those disadvantaged groups in the society made worse off through the unfair distribution of burdens and benefits resulting from the application of POMOPI in privacy law. For example, it is categorically unfair to ask a group of individuals such as celebrities or women to bear the costs of those press activities that serve the benefit of society in general. Applying distributive justice according to the principles underpinning the fairness factor requires that those who reap the benefits of press activities equitably bear

their costs. If the publisher reasonably but mistakenly believed that the publication of private information served public interest (such as revealing details about a Nazi-themed party and the mockery of Holocaust victims), [1229] it would be unfair to have only the victims (such as Mosley and the five female participants) bearing the negative consequences of such intrusive publication; fairness demands that the public who collectively benefit from such harmful activity should bear its costs in these instances as well as the publisher. The mainstream media who arguably constitute the most powerful entities within this sphere of public information should be *strictly* liable because they in turn are able to reasonably spread such costs on that consuming public who reap the benefits of harmful publications of private information. If the burdens of harmful publications were borne only by the victims instead of being spread across many participants, this would be an objectionable outcome from the perspective of distributive justice.

The standard of liability within POMOPI defences focuses on loss-shifting rather than loss-spreading, on the grounds that the costs of media intrusions were only incurred and carried by victims. Application of such loss-shifting criteria would exert a crushing and debilitating effect upon individuals' autonomous choices and personality development since the costs of privacy invasion were exclusively borne by specific participants rather than spread over the whole society. The media as economically powerful entities occupy optimum strategic positions for spreading the costs of harmful publications/damages in the fairest manner. The loss-spreading criterion may ensure the compensation of privacy harms without financially ruining the defendant (media) since the latter is able to redistribute such financial losses through and throughout their business with the latter partially and indirectly

[1229] Campbell (n 105) at 117; Mosley (n 118) at 122.

reassigned towards that particular section of society invested in the media outlet – both parties in this regard (media and consumer) reap the benefits of media activities and thereby can legitimately co-bear the costs.

The unavoidable overlap between defamation and privacy shed lights, as this thesis strongly emphasised, on the possibility to harmonise or unify certain defences to achieve a coherent protection of freedom of expression under the two independent and distinct causes of action in English defamation and of privacy as applied in American law. This is not only because the interests of reputation and privacy are different aspects of private life rights guaranteed under Article 8 ECHR, but also because the freedom of expression guaranteed by Article 10 ECHR requires also a unified and consistent protection. The harmonisation between defamation and privacy defences could be achieved by adding the element of public interest in the defences of truth and honest opinion.

In respect to the interaction between public interest and truth defences, this thesis emphasised that adopting the approach of South African law that requires an element of public interest to establish the defence of truth may additionally precipitate harmonisation of defamation and privacy since serious reputational harms may undermine also the right to respect of private life. For example, the fact that an individual suffers from a severe disease like HIV, contrary to the current legal approach of the Defamation Act 2013, should not be enough to justify dissemination of such information based on truth defence; rather, the defendant must establish the public interest of such dissemination. In addition, more coherent protections around freedom of expression could be achieved on the basis that under both torts the defendant must identify the public interest in disseminating the harmful publications. This harmonisation between truth and the public interest would play a pivotal

role in reducing the tension between interim injunctions rules applied in defamation and privacy since in such instances the court should identify the element of public interest before refusing to grant injunctive relief.

With reference to the interaction between freedom to criticize and honest opinion, the overlap in question may serve to precipitate reconsideration of the freedom to criticize as a potential justification for encroaching upon the right to privacy in light of the requirements around honest opinion defences in defamation. On such basis, there should exist information/facts as a prior requirement for private behaviour. The overlap may help to reconcile the defences of defamation and privacy as these are based on the right to criticise as an aspect of freedom of expression rights. In other words, the analogy between honest opinion and freedom to criticize, as similar aspects of exercising freedom of expression, may further extend the argument that freedom to criticize in privacy law should be upheld only in respect of facts or privileged statements as these are defined and applied within the scope of defamation law's *honest opinion*.

8. 4: Interim Injunction

With reference to the impact of the overlap on interim injunction rules, this thesis concluded that the mere existence of reputational harms within the privacy actions should not be a reason for applying the restrictive rule of *Bonnard v Perryman,* [1230] if there is a genuine basis for a privacy claim in the first place. Three justifications have been advanced to support the groundlessness of judicial attention to applying the injunctive test of defamation in privacy cases involving reputational harms. Firstly, this thesis addressed the objectionable inconsistency between the justifications of the *Bonnard v Perryman* test and privacy law with

[1230] [1891] 2 Ch 269

respect to the role of truth. If truth itself cannot be a defence in privacy law in the first place, there would arise undesirable incoherence in applying *Bonnard v Perryman* and its procedural requirements for establishing the defence of truth. The incoherence would be acute taking into account the fact that reputational interests are protected under article 8 ECHR. The fact that privacy is the core value explicitly protected in Article 8 ECHR may provide a reason for prioritising privacy rules over that reputation implicitly protected under this article. There should be equal weight afforded the claims of privacy and freedom of expression. The likelihood test in s. 12 (3) HRA 1998 may provide the right methodology for taking into account both sides of rights in conflict to achieve a proportionate balance between private life and freedom of expression. The mere engagement of Article 8 and 10 ECHR may require the court to undertake an intensive focus of the important values inherent in such rights without a presumed priority of one right over the other as one may have derived from the restrictive rule of *Bonnard v Perryman*.

Secondly, the application of economic analysis, based on costs and benefits criterion, provides additional grounds for prioritising the correct tests applying to interim injunctions. This thesis argued that the application of the *Bonnard v Perryman* rule (that likely ends with a rejection of temporary injunction) in privacy cases would inefficiently increase the social costs resulting from an erroneous judgement or procedural operation. The social costs of such a mistaken judgement cannot only be limited to personal suffering, frustration, disappointment and feelings of anger caused by undermining the intrinsic values of privacy invasion; they may also extend to emotional well-being, the promotion of human flourishing and freedom of expression. The costs of further litigations incurred by the litigants are also a part of those social costs that could be avoidable if an interlocutory injunction had been granted in the first place. The fact that privacy litigation costs may reach six-digit numbers

strengthens the case for the inefficiency of the *B v P* rule in the event of this being applied in the overlapping cases. Based on these objections, this thesis argues that prioritising the application of likelihood tests over Bonnard v Perryman tests could increase access to justice; the costs of obtaining such orders are relatively affordable when compared with the costs of applying Bonnard v Perryman. The efficiency of procedural law, therefore, may give priority to the likelihood test over the *B v P* test on the grounds that potentially granting interim injunctions may be more efficient than denying injunctive relief applications when applied to those cases that involve genuinely private and defamatory information.

As this thesis argues, the final insight, based upon which the likelihood test of Article 12 (3) HRA 1998 is deemed preferable to the *B v P* test, is derived from feminist analysis. This school of analysis argues that cases brought forward against women with improper motives (such as blackmail, making profits and revenge porn, motivated by and predicated upon the social bias against women within the double standard of sexuality and broad, historic gendered power disequilibrium) must be discouraged. Identifying and taking into account such improper motives and concomitant structural inequalities could be pivotal, as this thesis maintains, to prioritise the likelihood test over the *B v P* test. The conflicting tests vary upon whether the freedom of expression claim is weakened in the event of discernible improper motives behind the publications in question. Whilst the *B v P* test considers such motives irrelevant if the defendant decided to establish the truth of the information, the likelihood test takes into account motives that reduce the strength of any public interest claim when justify the publication. Based on this analysis, this thesis has argued that priority must be given to the likelihood test over the *B v P* test in the cases involving improper motives because of the desirability that injunction to achieve at least two key goals The first goal is to prevent use and reinforcement of the sexual double standards in society which disproportionately

humiliates women acknowledges that improper motives formally weaken claims of freedom of expression. The second is to discourage the commodification of indignity rights; allowing a person to sell the story of their partner's adultery, may falsely establish and reinforce the presumption of the former's de facto property right to exclusive sexual access.[1231]

8. 5: Damages

The thesis examined three interrelated issues: awarding reputational harms in privacy; vindicating the right to privacy; and accumulating the damages of defamation and privacy in the case of the overlap. Firstly, this thesis explained why the inclusion of reputational harms within privacy damages is principally right, since the protection of reputation is the shared function of defamation and privacy. There would be crucial incentives behind including reputation within the elements of damages in privacy law and these can be identified in economic analysis of civil procedures perspective. If the court considers that reputational harms come within the elements of damages in privacy, this might be an efficient way of minimising the judicial costs of litigations, since the claimant, practically speaking, would have little benefits for bringing defamation proceedings to redress her loss of reputation. Furthermore, there could be unjustified injustice inflicted upon victims of reputational harms caused by serious invasions of privacy should reputational harms be exclusively protected by defamation law. This is because not all invasions of privacy could satisfy the tests of defamation which may change over time– such as the changing shift in attitudes towards allegations of homosexuality.

Secondly, it is the contention of this thesis that the role of vindication in defamation and privacy depends on the definition of the concept of vindication itself. In doing so, all

[1231] See s. 3/Third of chapter 6.

remedies of defamation and privacy, whether injunctive or monetary, involve a vindicatory purpose if the vindication means the legal recognition of rights. The law of defamation and privacy may also play a role of vindication since they may identify the status of litigants as right-holders and wrongdoers. Taking into account the judicial and academic views, this thesis identified that the traditional primacy of the historical residue of monetary awards within common law actions was the main tool for vindicating the reputational interest. It concluded, however, that such primacy needs to be reconsidered given the insights provided by feminist analysis and efficiency analysis which conclude that defamation and privacy could vindicate their protected interests more effectively by granting, where possible, interlocutory injunction rather than by awarding monetary damages.

Finally, the thesis provided a detailed explanation of the relationship between the types of damages awarded in defamation and privacy and identified how, theoretically speaking, there would occur a double compensation in accumulating such damages. Regarding the compensatory damages, there could be a double compensation if emotional harms were compensated under the defamation and MOPI actions in respect of the same set of facts – since they address the same interest. The compensatory damages awarded to remedy the harms to reputation and privacy under the actions of defamation and MOPI are cumulative, since such interests are distinct and independent in the English law. By contrast, the American law allows the claimant to have only one recovery, whether under defamation or false light action, even though she is afforded the freedom to proceed upon either or both causes of action in the case of the overlap between defamation and false light torts. [1232]

[1232] The Restatement of the Law (second) Volume 3 (1977) §.652E, Comment b.

8. 6: Recommendations for future research

As previously explained in the introduction, due to the limitations of time and space, this research did not cover all the implications arising from the overlap between defamation and privacy. There could be, therefore, opportunities for engaging in further academic enquiry around the impact of the overlap with regards to potential application of defamation's procedural rules within privacy cases, for instance the summary judgement, strike out application and costs management. [1233] The impact of the new provisions of the Defamation Act 2013, such as the serious harm requirement, the single rule publication and the statutory defence of operators of websites could also be the subject of further research around examining their potential applicability within areas of privacy law. There also exists a research opportunity for examining the impacts of the overlap upon damages (particularly in comparison with American law) for instance that of accumulating defamation and privacy damages as this impacts upon the exercise of freedom of expression, and for examining possibility of awarding special damages in privacy law as applied in the law of defamation.

[1233] Richard Hyde, 'Procedural control and the proper balance between public and private interests in defamation claims' (2014) 6 JML 47.

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